No. 12,424

IN THE

United States Court of Appeals

For the Ninth Circuit

VINCENT HALLINAN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANT'S PETITION FOR A REHEARING.

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To the Honorable William Denman, Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

I.

PRELIMINARY STATEMENT.

With but one exception, all of the numerous instances of asserted contempt found by the trial Court and affirmed by this Court, consist of instances in which statements made or questions asked by appellant are said to have been made or asked in disregard

and defiance of previous rulings of the trial Court foreclosing appellant from making statements or asking questions of the character actually made or asked.

We will show, in this petition, that in not so much as a single one of the instances of asserted contempt mentioned in this Court's opinion was there a previous ruling foreclosing appellant from making a statement or asking a question of the character held to be contumacious. We will show, also, that only by assembling out of context and in foreshortened form unrelated matters in such a way as to indicate that they are related, and by intermixing therewith opinions of and charges made by the trial Court which are not substantiated by the record and "positions" taken by the prosecutor is any semblance of contumacious conduct made to appear. *We will show, also that a careful reading of this Court's opinion discloses that the above stated things are so.*

The one exception heretofore mentioned is the incident dealt with in the next to the last paragraph on page 6 of the printed opinion. We will show by the record that the remark therein quoted was not made in the hearing of the trial Court and could not have disrupted, or been intended to disrupt, the proceedings in the trial Court.

We will show, also, that the points on which this Court bases its conclusion that there was a lack of good faith on appellant's part are not well taken.

We will, in addition, restate certain points heretofore made and raise certain other points which could

not have been raised prior to the filing of this Court's opinion. The later points are raised in this petition to preserve our right to raise them in the Supreme Court.

II.

THE OPENING STATEMENT.

This Court divides all of the asserted contumacious acts of appellant during the opening statement into four categories, namely: statements relative to labor disputes; attacks upon the credibility and character of anticipated opposing witnesses; asserted wire-tapping and espionage by agents of the government; and the two incidents mentioned at the bottom of page 6 of the printed opinion. We will deal with these in the order selected by the Court.

A. UNION LABOR DISPUTES.

This Court discusses eight separate incidents under this category. We will deal with these in the order selected by this Court. In addition, this Court, in discussing the first of such incidents, makes reference to three previous instances. We will deal with these previous instances in our discussion of the first incident.

THE FIRST INCIDENT.

The first incident of asserted contempt upon the part of the appellant recited by this Court is stated on pages 2 and 3 of the printed opinion as follows:

"The rulings and assertions made during appellant's opening statement contain several lines of thought. For clarity we consider these rulings and assertions separately according to the subjects with which they deal. The first of these subjects is labor union disputes.

"In pronouncing the judgment of contempt the Court states: *'Mr. Hallinan, unbridled again, lapsed into a violation of the orders. At page 550 the Court had occasion to sustain an objection interposed by Mr. McMillan to matters that should not have been brought in on an opening statement and to matters which should not have been brought before the jury.'** The record pertaining to this incident shows the following:

"In the course of his opening statement appellant stated: 'Now, Mr. McMillan says that they will bring into this trial certain labor leaders, former associates of Harry Bridges. Unfortunately they will, because the labor movement, as you may have already observed, at times in its career turns back on itself and rends and destroys itself and engaged in internecine quarrels that destroy its utility.' The Court thereupon 'admonished' appellant that 'we are not trying warfare or alleged warfare between any union or any group and the like.' While the certificate makes no reference to prior admonitions the record discloses *this* to be the *fourth* time after appellant began his opening statement that the Court had *expressed the opinion* that historical accounts of labor union activities in which

*Emphasis ours throughout unless otherwise noted.

> Bridges had taken part were immaterial, were inflammatory or were far divorced from the indictment before the court."

Did appellant in this instance, as charged by the trial Court and impliedly held by this Court, "lapse into a violation of the orders" previously given by the trial Court?

Concerning this matter this Court says:

> "While the certificate makes no reference to prior admonitions the record discloses *this* to be the *fourth* time after appellant began his opening statement that the Court had *expressed the opinion* that historical accounts of labor union activities in which Bridges had taken part were immaterial, were inflammatory or were far divorced from the indictment before the court."

An *expression of opinion* by a trial Court may or may not amount to an order, ruling or admonition. The test is whether what the trial Court says forecloses a litigant from going forward on the subject mentioned by the trial Court. If the *litigant* is not foreclosed, *his attorney* is not foreclosed, for it is through his attorney that a litigant speaks.

In none of the three previous instances mentioned by this Court did the *expression of opinion* of the trial Court amount to an order, ruling or admonition foreclosing *the defendant Bridges* from making further comments in his opening statement on union labor disputes.

A search of the record reveals three and only three previous references by the trial Court to the subject of labor union disputes.

The first of such three previous instances appears on page 499 of the transcript. It reads as follows:

> "And without interrupting you unduly, we full well appreciate the genesis behind the labor movement in the United States, as well as in the State of California; and perhaps the waterfront travail that is written large in the history of this city as well as the state. Much of it is now written in granite, probably, in the history of this state. *I cannot see altogether at this juncture,*—I am not interrupting you unduly, *I want to feel the matter out as we go along,—I cannot feel at this juncture* how this historical narrative, however interesting it may be to all of us, would tend to prove or disprove any of the material allegations in this indictment contained."

A discussion followed in which union labor disputes were not again mentioned and which was closed by this statement at the bottom of page 500 of the transcript:

> "The Court. We will take a recess and *you think that over for a few minutes.*" (Emphasis added.)

The expressions by the trial Court, "I cannot see altogether at this juncture"; "I want to feel the matter out as I go along"; "I cannot feel at this juncture" and "you think that over for a few minutes" show not *decision* but **indecision**. There was not only no order, ruling or admonition but the "*opinion ex-*

pressed", if it can be said to be an opinion expressed, was not positive: it indicated no more than an inclination.

It left the matter open.

Observe that there was no mention of inflammatory matter or of vile epithets in this instance.

The second of such three previous instances commences on page 516 of the transcript. It reads as follows:

> "Now, how far you may go in an opening statement concerning the narrative background with respect to Mr. Bridges' benign influence on the waterfront will not affect the ultimate issue at bar, 'Did Mr. Bridges swear falsely?' I full well recognize, many people in this jurisdiction feel that he has had a benign influence on that waterfront; that he has done certain things for the working people there; other people feel directly to the contrary. And I think we had an exposition of that from our jury, in selecting these people. In a very forthright manner. Some said that they were prejudiced, others said that they had an open mind.
>
> "Now, *to take us back into the gory days of the bloody warfare on that waterfront and raise matters of hysteria and inflammatory matter* before this jury *is not going to answer this case, in my humble opinion."*

This statement was made during the course of a discussion, in the absence of the jury, between the Court and counsel which commenced on page 511 and ended on page 540 of the transcript. It was both in

form and nature an argument looking *in the direction of a possible or likely order,* ruling or admonition and not in the form or nature of an order, ruling or admonition *in and of itself.* The expression "is not going to answer this case, in my humble opinion" reveals that this is so.

"* * * is not going to answer this case" is both an ambiguous and argumentative statement. We assume that the trial Court meant by it "is not going to be the *determining factor* in this case." But defense counsel is not limited in an opening statement to the mention of matters which in the "humble opinion" of the trial judge will be *the* determining factor in the case. Moreover, the words "in my humble opinion" are inappropriate for an order, ruling or admonition or for an assertion *intended to be taken for or understood to be* an order, ruling or admonition.

Again the matter was left open.

Note that in this instance the trial Court recognized that there had been gory days of bloody warfare on the waterfront and in effect charged that to mention such matters would be inflammatory and raise hysteria. But it was at the time of those gory days of bloody warfare that Bridges was charged with having become a member of the Communist Party. Such charge could not be proved without taking "us back" to those gory days of bloody warfare.

The third of such three previous instances appears on pages 526 and 527 of the transcript. It reads as follows:

"The Court. I hold, gentlemen, as a matter of law, that **the bulk of** the opening statement thus far is immaterial to any rationalization of the charges at bar. I agree with counsel for the government that matters of interrogation of witnesses may be gone into; certainly impeachment may be indulged in to your heart's content, Mr. Hallinan. *You may cross examine without limitation on your part.* I believe in latitude on a cross examination. But to have this Court sit while you **dilate upon** matters that pertain to waterfront problems, trade union problems, employer-employee relationships, is to degenerate this case into a hearing far divorced from the indictment which is before me."

This statement of the trial Court has the *superficial* appearance of being an order, ruling or admonition foreclosing appellant from making further mention of labor union disputes during the remainder of the closing statement. On closer inspection, however, it clearly appears that the trial Court in this statement made two qualifications (probably for the purpose of saving itself from error should this Court on an appeal by the defendant Bridges from a judgment of conviction be of the view that the defendant Bridges had the *legal right,* in his opening statement, to inform the jury that he intended to prove that the charges made against him were false and that they had been fabricated, in part, by disgruntled former members of his own union and by rival union labor leaders in an attempt to "get even with him" or just to "get him"). The two qualifications are the phrases

which we have caused to be printed in bold-face type, namely, **"the bulk of"** and **"dilate upon"**.

The word "bulk", as used in this connection, means "the greater or principal part; main body; majority". It does *not* mean the whole or entirety. By the use of the phrase "the bulk of" the trial Court left *unidentified* the portions of the "opening statement thus far" which the trial Court considered to be irrelevant. As a result, the sentence in which the phrase "the bulk of" is contained did not condemn, *either as to the past or as to the future* **any particular** subject matter theretofore mentioned by appellant in the opening statement. More particularly, it did not foreclose appellant, as the attorney for the defendant Bridges, from making further reference *to the subject of labor union disputes.*

The word "dilate" is defined as *"to enlarge in all directions; swell;* **spread or puff out**; *distend; expand"*. As a result, the sentence in which the phrase "dilate upon" is contained did not prohibit **all** reference to labor union disputes in the portion of the opening statement still to come, but only such **enlarged, swelled, spread, distended** and **expanded** reference to that subject as would "degenerate this case into a hearing far divorced from the indictment which is before me".

In this instance, despite the otherwise positive form of the statement, there was no *definite* order, there was no *definite* ruling, there was no *definite* admonition, there was, *at most,* what this Court calls an *"ex-*

*pressed * * * opinion''* by the trial Court. Because of the two qualifying phrases the defendant Bridges could not successfully claim, *on an appeal by him from a judgment of conviction,* that the trial Court, *by what it said,* foreclosed him from making further mention of labor union disputes in the opening statement. If the defendant Bridges was not so foreclosed, then appellant, the attorney for the defendant Bridges and the only person through whom defendant Bridges could speak, was not so foreclosed.

Again the matter was left open.

Observe that in this instance the comment of the trial Court was made in the absence of the jury and was not directed to any particular statement by appellant. Thus there was no vile epithet or inflammatory matter in this instance.

An examination of these three previous instances reveals that the trial Court's statement that "Mr. Hallinan, unbridled again, lapsed into a violation of the orders.", is not only not substantiated by the record, *but that the record shows that there were no previous orders on this subject* **to be violated.**

From the foregoing we see that when appellant said

> "Now, Mr. McMillan says that they will bring into this trial certain labor leaders, formerly associates of Mr. Bridges. Unfortunately they will, because the labor movement, as you may have already observed, at times in its career turns back on itself and rends and destroys itself and engaged in internecine quarrels that destroy its utility.",

he did not, as charged by the trial Court and impliedly found by this Court, lapse into a violation of orders previously made by the trial Court. In other words, there were no previous orders to serve as predicate for the finding that the foregoing statement by appellant was contumacious. *Moreover, that there was nothing of an* **inflammatory** *nature in that statement is self-evident. Nor were any vile epithets hurled.* In addition, such statement was in direct response to the following statement made by government counsel in the opening statement of the prosecution on page 485 of the transcript:

> "We shall show the extreme care and caution which both the defendant Bridges and the Communist Party exercised over the many years of his membership to conceal that fact, even from the rank and file of its own membership. *We will prove it by the positive testimony of men and women who, by reason of their position* **in certain labor organizations** and by reason of their own position in the Communist Party, are able to testify to and will so testify positively, to the fact that defendant Bridges during the period alleged in the indictment was a member of the Communist Party of the United States."

We now turn from the three previous instances mentioned by this Court to the first incident, itself, and ask this question:

Did the trial Court in this incident make a ruling of such a character as to foreclose appellant from making further mention of labor union disputes during the opening statement?

The answer to this question is likewise "no!"

So that this will be unmistakably evident, we herewith quote this entire incident as it appears on pages 550 and 551 of the transcript:

"Now, Mr. McMillan says that they will bring into this trial certain labor leaders, former associates of Harry Bridges. Unfortunately they will, because the labor movement, as you may have all observed, at times in its career turns back on itself and rends and destroys itself and engaged in internecine quarrels that destroy its utility.

Mr. McMillan. *If your Honor please, is that a statement of what they expect to prove?*

Mr. Hallinan. Yes, certainly.

Mr. McMillan. *It seems to me that it is an argumentative statement.*

Mr. Hallinan. Oh, it is not. We are entitled to show the quarrels between these labor unions as modifying and explaining the witnesses who take the stand.

The Court. I will interrupt you momentarily, Mr. Hallinan, to admonish the jury and admonish you that we are not trying warfare or alleged warfare between any union or any group and the like. This case involves Mr. Harry Bridges, Mr. Robertson and Mr. Schmidt. Witnesses will be produced here. Now, the general trend of this opening statement is purely speculative, *so far as the Court is concerned.* It appears to be a blanket assertion of an attempt on Mr. Hallinan's part to discredit all the witnesses produced by the Government in one fell swoop. *I am not going to limit you* but, Mr. Hallinan, I say to you again it is not serving any particular purpose to

> the Court—*it may to the jury,* but I doubt it—to have these blanket assertions made. I think in the final analysis you should reserve your closing argument to the close of this case, realizing your extreme eloquence. *At the present time, may I suggest that you give an outline of what you have in mind?"*

This Court quotes the trial Court as certifying:

> "At page 550 the Court had occasion to sustain an objection interposed by Mr. McMillan to matters that should not have been brought in an opening statement and to matters that should not have been brought before the jury."

The record as above quoted reveals that Mr. McMillan made no objection (he merely asked a question and made a surmise) and that the trial Court did not sustain any objection.

It is true that the trial Court did admonish the jury and appellant that "we are not trying warfare or alleged warfare between any union or any group or the like" but that was not the sustaining of an objection. Moreover, it did not, either in terms or by implication, say that appellant's statement made reference "to matters which should not have been brought in an opening statement and the matters which should not have been brought before the jury", nor did it, either in terms or by implication, foreclose appellant from making further mention of labor union disputes.

That this is so is made unmistakably manifest by the trial Court's statement (which this Court neglected

to mention) that **"I AM NOT GOING TO LIMIT YOU * * * MR. HALLINAN * * *"**.

The trial Court in the certificate charges, and this Court in its opinion implies, that in this incident the trial Court placed a limitation on appellant. The record *affirmatively* discloses that the trial Court not only did not place a limitation on appellant, *but stated in so many words that it was not going to place a limitation on appellant.*

Even the qualification made by the trial Court (i.e., "but * * * I say to you again it is not serving any *particular* purpose to the Court—*it may to the jury* but I doubt it—* * *") by the word "particular" and by the clause "it may to the jury" left the matter of labor union disputes open for further mention by the appellant.

That this matter was left open is further revealed by the last sentence of the trial Court's statement in this incident, i.e.: *"At the present time may I suggest that* **you give an outline of what you have in mind?"**

This statement, in the form of a question, called upon appellant **at that time, and in the presence of the jury,** to give an outline of **his reason** for contending that the discussion of labor union disputes was relevant and material and proper in an opening statement.

The record discloses that as soon as the trial Court made that request appellant proceeded to give the

Court an outline and explanation of what he had in mind in that respect. The first two paragraphs of appellant's outline or explanation appear on pages 551 and 552 of the transcript as follows:

> "Mr. Hallinan. Very well, Your Honor; but Your Honor has very accurately defined the purpose. Every witness that the prosecution will produce will be impeached in advance by the interest, the motive and his prior conduct to Harry Bridges, and that is all I want to tell the jury. In other words, I want the jury to look at these witnesses as they take the stand and not be deceived, **but reserve judgment** as to whether we will not show those things.
>
> *"I suppose if I deceive this jury, or if I say something that I can not prove to the extent that I have promised to prove it, then my credit with the jury and the credit of the entire defense lapses. And I am willing that that should be so.* **Now, I can't see how I could be more sincere than that.** And I will also say this, Your Honor, that if the Reporter takes down the statements that I am making, at the end of this case the jury, yourself and the prosecutors will admit that every word of it has been properly introduced in evidence."

Both the trial Court and counsel for the government allowed this explanation to stand without challenge or comment. Appellant was not forbidden to proceed along the lines indicated by him. On the contrary, he was, *by the silence of the Court, by the apparent acquiescence of the Court,* **given permission to proceed along those lines.**

We note that this Court does not directly hold that in this incident the trial Court made an order, ruling or admonition foreclosing appellant from making further mention of labor union disputes. We note that all that this Court directly holds in this respect is that

> "* * * the record discloses that *this* is the *fourth* time after appellant began his opening statement that the trial Court **expressed the opinion** that historical accounts of labor union activities in which Bridges had taken part were immaterial, were inflammatory or were far divorced from the indictment before the Court."

As there is no order, ruling or admonition in this first incident foreclosing appellant from further mention of labor union disputes it follows that this incident cannot correctly be made the predicate for a holding that appellant was guilty of contempt in making further references to that subject in the opening statement.

Note that what appellant said in this incident was not in the least bit inflammatory and that he hurled no vile epithets. Such hurling as was done was done by the trial Court in saying that appellant was trying to destroy all Government witnesses "in one fell swoop".

SECOND INCIDENT.

The second incident is recited by this Court as follows:

> "Subsequently, appellant again began a recital of a history of the growth of the C.I.O., and its expulsion from the A.F.L., which was said to

have been accompanied by charges that the C.I.O. and certain of its leaders, including Bridges, were communistic. This recital was objected to and the objection sustained."

The record account of this incident, beginning on page 553 and ending on page 554 reads as follows:

"Mr. Hallinan. * * * This source of witnesses that counsel has told you he is going to produce here, comes very close to the matter that I am now going to discuss with you. I have said that a certain company union had existed on the waterfront and was replaced by an American Federation of Labor union, and then the American Federation of Labor assigned a certain committee called the Committee for Industrial Organization under John L. Lewis to organize industries on a total basis. We all know prior to that time most unions were local craft unions, rather loosely amalgamated, and they were not industrial unions. But the new union under the NRA matter, the CIO, the Committee for Industrial Organization, became very active and very successful and finally some difficulty—we won't inquire into that unless it be considered argumentative—caused the American Federation of Labor to quarrel with the CIO and ultimately to expel them. The CIO was then considered what is called a leftwing organization, democratic, with no discriminations against anybody for race, religious belief or political belief, and it was called by the A. F. of L. Communistic.

And Harry Bridges, who was then an officer of the A. F. of L., was expelled from the Union as Communistic, *because* he encouraged the amalga-

mation of the Longshoremen with the CIO. There again, a great——

Mr. McMillan. May it please your Honor, we are obliged—patience has always been a very predominant feature in my nature, but I can't let these matters go by.

The Court. The objection is sustained." (Emphasis added.)

The statement by appellant had proceeded for six sentences. No objection was made to any of the first five of these sentences. The objection was to the sixth sentence and, it would appear, not to appellant's mention of labor union disputes as such (*and certainly not to appellant's admission that Bridges was expelled from the union as Communistic for such an admission militated in favor of the prosecution and against the defense*) but to appellant's assertion that Bridges was expelled from the union "*because* he encouraged the amalgamation of the Longshoremen with the CIO".

Be it noted that neither the ground nor the scope of Mr. McMillan's objection was stated either in the objection of itself or in the trial Court's ruling. As a result appellant was entitled to assume that the objection was to the last remark, that the ground of the objection was that the remark was argumentative and that the trial Court sustained the objection on that ground and solely on that ground. Certainly appellant was not required to assume that the objection ran to the entire six sentences or to the mention of union labor disputes where there was nothing stated in the objection to so indicate and where the trial Court

just three pages of the transcript preceding the objection had stated, with reference to the subject matter of union labor disputes, that *it was not going to limit appellant.*

Note that there was no inflammatory matter or vile epithets in this incident.

THIRD INCIDENT.

The third incident is recited by this Court as follows:

> "The Court, in its certificate, then refers to a long dissertation by appellant concerning 'some internal warfare between the C.I.O. and the A. F. of L.' It appears of record that immediately after the sustaining of the above objection, appellant made some statement concerning the affiliation of Bridges' I.L.W.U. with the C.I.O. and began a further discussion of a Maritime federation of the Pacific. Objection was again made and sustained."

The record account of this incident beginning on page 554 and ending on page 555 of the transcript is as follows:

> "Mr. Hallinan. Getting away from that point of it and coming directly to a witness who will be brought in here, and to two other witnesses who will be the agents of that particular witness, the difficulty as to what master organization these unions would associate with being resolved by the longshoremen, the ILWU, in favor of the Committee for Industrial Organization, by an enormous vote that union left the American Federation of Labor and associated with the Committee

for Industrial Organization. A number of unions along the Pacific Coast engaged in maritime and longshore work had been amalgamated for some years in a federation called the Maritime Federation of the Pacific. The longshore workers' union was the largest of the——

Mr. McMillan. May it please your Honor again, I object to this *historical matter*. I can't for the life of me see at any stage of this case where this *historical situation* would be admissible.

Mr. Hallinan. If counsel would give me five minutes, I will show him in an instant and I will define one of his witnesses for him within the five minutes.

Mr. McMillan. Well, may it please your Honor, the difficulty about this whole matter is, *it is historical and it is argumentative;* it properly belongs in an argument, not an opening statement. *In an opening statement it is not intended to take a* **shotgun**——

The Court. The objection is sustained."

The trial Court's ruling was in response to Mr. McMillan's objection. Mr. McMillan objected that what appellant had just said related to a historical situation, was argumentative and was in the nature of a **shotgun** discharge. The trial Court made no ruling until Mr. McMillan uttered the word "**shotgun**". Being in response to Mr. McMillan's objection, the trial Court's ruling was to the effect that what appellant had just said was *too broad and too general* in character and that appellant should be *more specific;* that he should not spread his shots *as a shotgun does.* Or, to say the least, *that is what appellant had the*

right **reasonably** *to assume the trial Court meant by this ruling.* The trial Court may have had in mind a different meaning, a broader meaning. If so, that different and broader meaning was not stated. Appellant, of course, was not bound by the undisclosed thoughts and intentions of the trial Court, he was not required to read the mind of the judge of that Court under sanction that if he failed to read it fully and correctly he would become liable to imprisonment for criminal contempt.

Note that nothing said by appellant was inflammatory or a vile epithet. The epithet hurled in this instance was hurled by Mr. McMillan and consisted of the shotgun reference.

FOURTH INCIDENT.

The fourth incident is recited by this Court as follows:

> "Immediately thereafter, *in disregard of the ruling,* appellant continued with the discussion of the Maritime Federation of the Pacific, and its alleged control by Harry Lundeberg, who appellant stated would be a government witness, and to whom he referred in derogatory language. Objection was made and the Court said: 'What Mr. Hallinan has to say is in reality that type of matter that may be reserved for closing argument, if the facts demonstrate it. * * * I think, Mr. Hallinan, that these excoriations and vituperative matter bearing upon Mr. Lundeberg and others has no place at the present time.' "

The record account of this incident beginning on page 555 and ending on page 557 reads as follows:

"Mr. Hallinan. Now, an organization of sailors on the Pacific Coast, a member of the Maritime Federation of the Pacific, was controlled by a man who will appear before you. His name is Harry Lundeberg, one of the most remarkable of the witnesses that will be produced. He is like a character from Jack London, a typical bucko mate, with a reputation for violence and ferocity as wide as the Seven Seas—a man who has been arrested for brawling and assaults in half the courts of the world. Dominating this union with an iron hand, he burned the ballots that were taken——

Mr. McMillan. If your Honor please——

Mr. Hallinan. ——by his union concerning the Federation——

Mr. McMillan. Just one moment.

Mr. Hallinan. Pardon me. You want to talk?

Mr. McMillan. I want to make an objection, Mr. Hallinan. You as a lawyer, with your wide experience, know that you have no such statements to prove in this court.

The Court. This—I again repeat another admonition to the jury, that what Mr. Hallinan has to say is in reality that type of matter that *may* be reserved for closing argument, if the facts demonstrate it. *This wild anticipation of the Government's case is* **to my mind novel**; *I have never experienced it before in these courts, and I am naturally indulgent toward counsel on both sides,* to the end that this case be heard fairly, impartially and that we have all the evidence before us. But *I think, Mr. Hallinan,* that these excoriations and vituperative matter bearing upon Mr. Lundeberg and others *has no place at the present time.*

Mr. Hallinan. Very well.

Mr. McMillan. May I interrupt, just to give a good example? He has stated Mr. Lundeberg has been arrested in every port——

The Court. I noticed that. I noticed that. All parts of the world. And I will instruct the jury to disregard *that* statement.

Mr. McMillan. Well, the point that I had——

The Court. I was hopeful that we might get into the evidentiary matter, have the case under way. I am not going to foreclose Government counsel or defense counsel from the widest argument at the close of this case. I am not going to foreclose them on time.

Mr. McMillan. Yes.

The Court. I never have. I assure you, Mr. Hallinan, that I will give you ample time, as well as your colleague, Mr. MacInnis, to argue the matter from its fullest picture. But at the present time I say again to you, with the mild degree of patience that I command, that you are going far afield from any opening statement that I have ever heard in this court or any other court.

Mr. McMillan. Your Honor, what I wished to point out definitely is this: Those statements with reference to arrest; now, Mr. Hallinan is a skilled lawyer, and knows that if that witness takes the stand and he seeks to impeach that witness, the only question that he could ask him is, 'Have you ever been convicted of a felony?'

The Court. I understand.

Mr. Hallinan. I don't intend to prove it by that witness; I will prove it by one of your own witnesses. One of his own, his other witnesses."

We observe that this Court says:

> "Immediately thereafter, in disregard of the ruling, appellant continued with the discussion of the Maritime Federation of the Pacific * * *" etc.

Actually, what appellant did was to begin at once to *comply* with the trial Court's ruling *as appellant understood it,* that is *by becoming specific,* by singling out for comment one of the persons whom he expected to be called as a prosecution witness.

Lundeberg had not only testified against the defendant Bridges in the second deportation proceeding (testifying that Bridges admitted to him that he, Bridges, was a member of the Communist Party) but Lundeberg was the only one of 125 witnesses who had testified against Bridges in one or the other of the two deportation proceedings who had not been thoroughly discredited and their testimony completely rejected by the reviewing officers of the government. [See *Bridges v. Wixon,* 326 U.S. 135, and also the printed record of this Court in the case of *Bridges v. Wixon* before it went to the Supreme Court of the United States.] Appellant, therefore, had every reason to expect that Lundeberg would be called as a prosecution witness in the case then on trial.

Again we say that appellant was trying to *comply* with the trial Court's ruling by leaving the general and getting to the particular. He did not intend to disregard the previous rulings of the trial Court and he did not *in fact* disregard that ruling, as stated by this Court.

Neither the objection nor the ruling in this incident was directed against the mention of labor union disputes. Both the objection and the ruling were directed to what the trial Court called "these excoriations and vituperative matter" and the extent of the Court's ruling was to say that the trial Court thought that such matters had "no place at *the present time*". Again, an *expression of opinion* not amounting to an order.

Note that what appellant said in this instance was to use this Court's words "derogatory language". It was not inflammatory and it did not descend to the level of vile epithets.

FIFTH INCIDENT.

The fifth incident is recited by this Court as follows:

> "The certificate recites that only a few seconds or minutes later, appellant again 'launched into the *same* demeanor, same conduct, persistent, studied as it was.' From the record we learn that when appellant resumed his opening statement, his very first sentence had to do with quarrels between Bridges' union and the A.F.L. He went on to charge that Lundeberg and another labor leader were joined in their fight against Bridges and the latter's union by employer groups, goon squads, killers and perjurers. After the statement that certain government officials also joined in this persecution of Bridges, although other 'upstanding, granite-honest' government officials had gone out of their way to protect him, another objection was interposed and sustained."

First, let us comment on the assertion which this Court quotes from the certificate, viz.:

> "launched into the same demeanor, same conduct, persistent and studied as it was"

What was the "**same** demeanor"? Search the certificate from one end to the other and there will not be found any description, any word picture, concerning appellant's demeanor. And search the entire record and there will not be found *any* reference to *any* demeanor of appellant as being improper, boisterous, surly or otherwise unbecoming. Here the trial Court by the word *"same"* is charging by implication, **by innuendo, BY SUGGESTION** that which, *if so,* should have been charged in *direct and unmistakable terms.* And here we find this Court being misled by that suggestion and itself repeating it, *although it finds no substantiation in the record.*

The record shows that appellant resumed his statement about the two-thirds mark on page 557 of the transcript and that he continued talking *without interruption by either Court or counsel* to about the same position on page 560: a matter of three transcript pages and about four minutes of time. It is true that during that period appellant made mention of labor union disputes, but the pertinent things to observe are first, that no objection was made either by government counsel or the Court to what appellant said on that subject and, second, that the next objection, when it came, was directed against a statement by appellant which had *nothing whatever* to do

with the subject of labor union disputes. As is indicated in this Court's opinion, the next objection was to the following statement by appellant appearing on page 560 of the transcript:

> "But let me say this right now for the jury, that any mention that is made of the activity of the Government officials in that connection does not mean the United States Government as a whole, or does not mean the majority of the officials or any officials other than the ones designated, because at every juncture of his career, when his safety and his happiness were threatened, some fine, upstanding, granite-honest *American official,—and usually in a high place*—leaned down and lifted Harry Bridges and delivered him from the coils——"

The objection and the ruling were as follows:

> "Mr. McMillan. If your Honor please, that is also part of a closing argument. It is purely argumentative.
>
> The Court. Yes, objection sustained." (Tr. pp. 560-561.)

There is nothing either in this objection or in this ruling which either directly or indirectly relates to the subject of labor union disputes.

In this instance there was no inflammatory matter and no vile epithets as we will show in the all italics paragraph at the end of the 10th incident.

SIXTH INCIDENT.

The sixth incident is recited by this Court as follows:

> "Immediately thereafter appellant said, 'the strength and extent to which these people were willing to go may be learned from the fact that as early as 1936 they caused a warrant for Mr. Bridges' arrest on a deportation inquiry to be issued by the Secretary of Labor.' Appellant also referred to the passage of a 'bill of attainder' against Mr. Bridges by the United States House of Representatives * * *".

The record pertaining to this incident (Tr. p. 561) is as follows:

> "Mr. Hallinan. The strength and extent to which these people were willing to go may be learned from the fact that as early as 1936 they caused a warrant for Mr. Bridges' arrest on a deportation inquiry to be issued by the Secretary of Labor. The result of that deportation inquiry I am not going to go into, but the fact that one existed is of the utmost importance, and is one of the things that the jury will have to take into consideration in analyzing what the witnesses are saying. And I will presently explain to you why.
>
> The United States House of Representatives passed as against Harry Bridges the only bill of attainder ever passed in the United States, and——
>
> Mr. McMillan. Your Honor, if your Honor, please, that is argumentative. He is not in some conference now.
>
> The Court. Objection sustained."

It is self-evident that such a statement by appellant made no reference to the subject of labor union disputes and that neither the objection nor the ruling had any relation to that subject.

Note that there was no inflammatory matter and no vile epithets in this instance.

SEVENTH INCIDENT.

The seventh incident is recited by this Court (as a continuation of the sentence in which the reference to the sixth incident is ended) as follows:

> "* * * and also stated that 'Mr. Bridges has made the mistake of not taking the $50,000 that was offered to him back in 1934 to throw the strike and go back to Australia.' Again objection was made and again sustained * * *"

The record discloses that this seventh incident occurred on pages 577 and 578 of the transcript (i.e., some 16 transcript pages and approximately twenty minutes in time subsequent to the sixth incident).

The record account of this seventh incident is as follows:

> "The Court. You may proceed.
>
> Mr. Hallinan. However, Mr. Bridges has made the mistake of not taking the $50,000 that was offered to him back in 1934 to throw the strike and go on back to Australia——
>
> Mr. McMillan. That is objected to.
>
> Mr. Hallinan. We will show that.
>
> The Court. The objection is sustained and the jury is instructed to disregard the statement."

We suppose that the unstated ground of this objection was that the matter stated by appellant was irrelevant and immaterial. The statement did not deal with a union labor dispute as such but with the defendant Bridges' asserted act of refusing an offer of $50,000 to throw a strike. The ruling was not directed against the mention of union labor disputes.

Again no inflammatory matter and no vile epithets.

EIGHTH INCIDENT.

The eighth and last incident mentioned by this Court under the heading of labor union disputes is stated by this Court as follows:

> "* * * and appellant then referred to the labor situation in Hawaii as 'the renewal of about what had happened in San Francisco—poison gas and clubs for the workers * * *'. Again objection was made and again sustained."

The record printing of this eighth incident (Tr. pp. 579-580) is as follows:

> "The Court. Proceed.
>
> Mr. Hallinan. The International Longshore Workers Union went down to Hawaii and organized the disorganized and exploited workers there, and they drew down upon themselves and upon Bridges anew the malice, hatred and revenge that has flowered this conspiracy anew of the powerful feudal five companies of the New Hawaii, and that is the immediate cause of what is now confronting us. The situation there was the renewal of about what had happened in San Francisco—

poison gas and clubs for the workers and a storing up of the——

Mr. McMillan. If it please Your Honor,——

Mr. Hallinan. This is not ancient history; this happened within the last year.

Mr. McMillan. The poison gas, rocks, stones——

The Court. The objection is sustained, Mr. McMillan."

This statement by appellant did relate to a labor union dispute. It was not in disregard or in defiance of any previous ruling of the trial Court, however. The only previous ruling of the trial Court relating to the mention of union labor disputes was, as we have pointed out, the ruling in the third incident and it related, again as we have pointed out, to *general rather than specific* (i.e., **shotgun) historical** *accounts of union labor disputes.*

Note that here there was no inflammatory matter and no vile epithets. That there had been violence in the recent Hawaiian strike was well known.

B. ATTACKS ON CREDIBILITY AND CHARACTER OF OPPOSING WITNESSES.

The Court commences its discussion of this subject with the following statement:

"The next type of matter found in the opening statement consists of direct attacks upon the credibility and character of anticipated opposing witnesses. The Court, in the absence of the jury, stated that *in its opinion* appellant had, in his

opening statement, been 'anticipating much of the Government's case, indulging in speculation on speculation,' and 'creating an atmospheric quantity at this stage designed to prejudice and inflame the jury.' *Reference is made to Government counsel's statement as to the position of the Government. This, the record discloses, was to the effect that appellant was not entitled to attack the credibility of prosecution witnesses in the opening statement.*"

We find in this statement something which to us is strange. Strange to the point of being literally dreadful in its implications. We believe that once we have pointed this thing out, this Court, out of consideration for itself as well as for the law, will want to give this case further consideration before going on permanent record.

What is the strange thing of dreadful implications which we find in the foregoing statement of this Court? We find the trial Court making reference to the "position" taken by government counsel *as a predicate for a summary judgment holding appellant in criminal contempt of Court* and we find this Court making reference to that "position" of the prosecutor *as a predicate for affirming that summary judgment of criminal contempt.*

From what we have read upon the subject we suppose that in a totalitarian country, where no dissent is permitted and the prosecutor speaks with the voice of supreme authority, a defense counsel who did not accede to and follow a "position" taken by the prose-

cutor would be summarily imprisoned for criminal contempt. But we had no idea that any trial Court in our land would consider such an action contempt of Court, much less criminal contempt of Court, or that any Appellate Court in our land would base an affirmance in a summary judgment of criminal contempt, either in whole or in **ANY** part, upon the charge that defense counsel in a criminal case had failed to follow a "position" taken by the prosecuting attorney **concerning how the case of the defendant should be presented.**

Is the former not precisely what the trial Court has done in this case? And is the latter not precisely what this Court is **doing** in this case? What relevance or materiality **could** the reference to the "position" taken by the prosecutor have, either in the trial Court's certificate or in this Court's opinion, *except to serve as a* **predicate** *for the judgment?*

It should be observed that neither in the certificate of the trial Court nor in the statement of this Court is it said that the "position" so taken by the prosecutor was adopted by the trial Court, that is converted by the trial Court into a ruling. The record discloses that the trial Court did not, either directly or by implication, adopt the "position" so taken by the prosecutor. Indeed, in the *first* statement made by the trial Court *after* the prosecutor had stated his "position" (the position being stated by the prosecutor on page 530 of the transcript and the following statement by the Court being made on pages 530 and 531 of the transcript) the trial Court said, addressing appellant:

"I of course am at a loss presently to indicate to you how we may delimit your presentation at this time".*

In other words, one of the acts of contempt *certified* by the trial Court and *accepted* by this Court *upon which the judgment is made to rest* is an act of appellant in not acquiescing in and following a "position" *taken by the prosecutor* **which was not made a ruling of the trial Court.**

We find in the foregoing statement of this Court another thing which to us has dreadful implications.

The trial Court would not have made reference to the "position" taken by the prosecutor nor would this Court have stated the "position" taken by the prosecutor had not the trial Court and this Court severally been of the view that such "position" was legally sound. That "position" was not and is not legally sound. *It runs counter to the fundamental principles of our American system of justice.* And that this is so is subject to demonstration.

Every prosecuting attorney, at the commencement of a criminal trial, makes an opening statement. In making that opening statement he says things *which attack the credibility and character* of the defendant, or of the defendants, as the case may be. *This is necessarily so.* **He could not make an opening statement without so doing.**

---

*The trial Court, in the certificate, made reference to but did not quote this statement. Compare Transcript pages 531 and 778. This Court makes no reference to this statement.

In this case the prosecuting attorney in his opening statement told the jury that he would prove that the defendant Bridges was a member of the Communist Party, that he had committed perjury, that he had defrauded the government and that he had conspired with the other two defendants and with "divers persons to the Grand Jury unknown" to commit perjury and to defraud the government. The prosecuting attorney also told the jury in that opening statement that he would prove that each of the other two defendants was a member of the Communist Party, had conspired with the defendant Bridges to commit perjury and to defraud the government and had aided and abetted the defendant Bridges in committing perjury and in defrauding the government. In so doing the prosecuting attorney *attacked the credibility and character of each of the three defendants* and, by the expression "divers persons to the Grand Jury unknown," *of* **every** *person* the defendants **possibly** could call to controvert *directly* (as distinguished from circumstantially) the witnesses whom the prosecution would call to establish the offenses charged against the three defendants.

We do not complain of this. That was the prosecuting attorney's legal right.

But the law of our land gives to the prosecutor no greater breadth or depth or scope in the making of an opening statement *than it gives to the defense.* Our system of justice **leans** in such matters not in favor of the prosecution *but in favor of the defense.* It

does so in the presumption of innocence, in the doctrine of reasonable doubt, in the allowance of more peremptory challenges to the defense than to the prosecution and in the right of appeal to the defendant on conviction but not to the prosecution on acquittal. It does so in many other ways. In not *one single way* does it give to the prosecution a greater leeway.

Yet is the opposite of this not precisely what the prosecutor contended by taking the "position" that "appellant was not entitled to attack the credibility of prosecution witnesses in the opening statement"? *And is the opposite of this not precisely what the trial Court by necessary implication held when it made reference to that "position" of the prosecutor as a predicate for judging appellant guilty of criminal contempt?* **And is the opposite of this not precisely what this Court by necessary implication holds when it states that "position" of the prosecutor and uses it as predicate for upholding appellant's conviction?**

We will say in all sincerity that by reason of the statement of this Court which we have just discussed, if the present opinion of this Court is allowed to become the decision of this Court and if the Supreme Court of the United States by reason of the haste which it must exercise in passing on petitions for certiorari refuse to grant certiorari a *dangerous,* **repressive** and **UNAMERICAN** precedent will have been set which, if followed, *will lead to the destruction of our cherished system and concept of justice.*

Concluding our comment on the above statement of this Court, we again call attention to the fact that there was no ruling of the trial Court foreclosing appellant upon resuming the opening statement from attacking the credibility and character of anticipated opposing witnesses. There was only the "position" taken by the prosecutor to serve as a predicate for a finding of contempt, should appellant make such an attack.

NINTH INCIDENT.

We now proceed to the first incident under this heading mentioned by this Court. We will call it the "Ninth Incident" for the purpose of easy reference and to avoid confusion. It is stated by this Court as follows:

> "Appellant then resumed his opening statement. We learn from the record and certificate that appellant referred to Harry Lundeberg as 'one of the most remarkable of the witnesses that will be produced,' 'like a character from Jack London, a typical bucko mate, with a reputation for violence and ferocity as wide as the Seven Seas, a man who has been arrested for brawling and assaults in half the courts of the world.' Objection was again made and the Court stated: 'This wild anticipation of the Government's case is to my mind novel,' and ruled that 'these excoriations and vituperative matter bearing upon Mr. Lundeberg and others has no place at the present time.' The Court also specifically instructed the jury to disregard the statements about Lundeberg's arrests in all parts of the world."

We have hereinbefore quoted the record concerning this incident under the Fourth Incident, supra, pages 23-24.

In this incident did the trial Court make a ruling foreclosing appellant from making further attacks upon the credibility and character of anticipated opposing witnesses? It did not. It did what in other instances this Court has called "expressed * * * opinion". That this is so, is revealed by the following excerpt from the trial Court's statement, giving particular attention to the words printed in italics:

> "The Court. This—I again repeat another admonition to the jury, that what Mr. Hallinan has to say is in reality that type of matter, that *may* be reserved for closing argument, if the facts demonstrate it. This wild anticipation of the Government's case is *to my mind* novel; I have never experienced it before in these courts, and *I am naturally indulgent toward counsel on both Sides* to the end that this case be heard fairly, impartially and that we have all the evidence before us. But *I think,* Mr. Hallinan, that these excoriations and vituperative matter bearing upon Mr. Lundeberg and others has no place at the present time."

It should be observed further that the only portion of appellant's statement which the trial Court instructed the jury to disregard was that part about Lundeberg's having been arrested in various parts of the world. The following excerpt from the record will reveal that this is so:

"Mr. McMillan. May I interrupt, just to give a good example? He has stated Mr. Lundeberg has been arrested in every port——

The Court. I noticed that. I noticed that. All parts of the world. And I will instruct the jury to disregard the statement."

In this incident nothing inflammatory, nothing calculated or likely to rise the passions of the jury, was said by appellant. What appellant said about Lundeberg was, as this Court said in its comment under the fourth incident, "derogatory". But referring to Lundeberg as like a character from Jack London fell far short of being a "vile epithet". The reference to his having a reputation for violence and ferocity as wide as the seven seas and of having been arrested for brawling and assaults in half the ports of the world was, obviously, *a hyperbole, was* obviously, *a poetic or rhetorical overstatement; like the statement "I am so hungry I could eat a horse, hides, hoof and all". But the general characterization which appellant gave of Lundeberg was capable of being proved, capable of being seen by the jury to be true not only as the result of the testimony of other witnesses but through examination and cross-examination and the demeanor on the witness stand of Lundeberg, himself.*

TENTH INCIDENT.

The next incident is stated by this Court as follows:

"Only a few seconds later, appellant 'launched into the the same demeanor, same conduct, persistent, studied as it was'. The subsequent state-

ments included assertions that the defense would prove that Lundeberg and another labor leader employed a known murderer to kill Bridges and did in fact send a man to New Orleans who killed a C.I.O. organizer there. Appellant also asserted that the labor leaders had under their control goon squads, killers and perjurers."

Court is referring to the middle portion of the statement by appellant commencing at about the two-thirds mark on page 557 and ending at about the two-thirds mark on page 560 of the transcript which we discussed under the Fifth Incident. As we pointed out in that discussion, the matters to which this Court now refers were not objected to either by Government counsel or by the trial Court. Such remarks, therefore, could have constituted contempt only had there been a previous order by the trial Court foreclosing appellant from making statements of this kind. As we have shown, the trial Court had not previously made any such order. And this incident could serve as the predicate for subsequent contempt only if this incident contained such an order. It does not. It does not contain even so much as an "expressed opinion" by the trial Court.

The statement of appellant here quoted by this Court is factually true. That some labor leaders do have "goon squads" under their control is a matter of common knowledge. That at times murder and attempted murder is resorted to in inter-union conflicts is exemplified by the assaults which have been made upon the Reuther brothers. That there is a gangster

element within the ranks of organized labor which resorts to violence, blackmail, extortion and perjury is exemplified in the publicly revealed history of Browne and Bioff in the moving picture industry. Here appellant was not hurling vile epithets, he was stating facts which he was prepared to prove, in part circumstantially and in part by direct evidence. It so happened that defendant Robertson was a victim of one of the "goon squads" mentioned, that he was beaten up and his back nearly broken in New Orleans, and that another CIO organizer was killed by such a "goon squad" in New Orleans.

ELEVENTH INCIDENT.

The next incident is stated by this Court as follows:

> "Appellant further stated: 'Now, as early as 1936 there had been introduced into Harry Bridges' union and into his personal office as his private secretary a woman employed by the Waterfront Employers Association, and she was also the mistress of Mr. Harry Lundeberg.' Objection was made and appellant gave as justification for the statement his purpose of showing Bridges' consciousness of being watched by agents of his enemies, who would use against him any detected activities in the Communist Party. The Court then said, among other things, that an opening statement was not a sounding board for giving vent to immaterial matters, and that it was very unfair to make such a reference to the woman."

This statement is accurate except in one particular. The trial Court did not say "That it was very unfair

to make such a reference to the woman". What the trial Court did say in this respect was, "I *think* it rather an extreme situation that reference be made to this woman at this juncture without evidence before the Court or jury". (Transcript page 567.) Moreover, the trial Court did not sustain the prosecutor's objection or admonish the jury to disregard appellant's statement.

The only objectionable matter here is the reference to the unnamed woman having been a *mistress* of Lundeberg. That statement may have been in bad taste. But as far as being inflammatory is concerned *it was much more likely to have incensed the jury against appellant and his client* than to have aroused the passions of the jury against the prosecution or the prosecution's case. The word *"mistress"* was not used for the purpose of moral censure but to name *a relationship.* It had a direct bearing upon the credibility of several prospective prosecution witnesses. Moreover, at the trial it developed that that woman was discharged by Bridges. He testified that it was because it was discovered that she was spying against the union, revealing to the enemies of the union and adversaries of the union confidential union affairs. The prosecution contended, through several witnesses, that she was discharged as a matter of Communist Party discipline. The word "mistress" was not used as an epithet *but to name a relationship.*

TWELFTH INCIDENT.

The next incident is stated by this Court as follows:

"After some discussion, the Court stated to appellant: 'You characterized all of these witnesses as perjurers, low people, characterized them with vile, vituperative terms. 125 in number. I do not know at the present time the identity of any witness about to be called for the United States Government, and I dare say that in large part you do not. Now *I think* it highly unfair to this court, indulgent as I have been with you, to continue on that line or that particular vein.' "

The record concerning this incident is as follows:

"Mr. Hallinan (addressing the Court), * * * Now, they said that they would show that in conformity with Communist Party plans of keeping secret the membership of persons prominently identified, that membership cards issued to the defendant were issued in the name of Harry Bridges, that he was some kind of a secret, hidden conspiratorial sort of member; that he was elected under some sort of secret and guilty idea. Now, they can come out and say that in an opening statement and try to blacken these gentlemen before anything starts. But because we mention some woman, without revealing her name at all, but who we suppose and expect is going to be a witness here, and who, if we haven't——

The Court. No. Now, Mr. Hallinan,——

Mr. Hallinan. We will produce the evidence on it.

The Court. Mr. Hallinan, let us pause momentarily and analyze just what we say. You characterized wholesale all of these witnesses as per-

jurers, low people, characterized them with vile, vituperative terms. 125 in number. I do not know at the present time the identity of any witness about to be called for the United States Government, and I dare say that in large part you do not. Now, *I think* it highly unfair to this Court, indulgent as I have been with you, to continue on that line or that particular vein." (Transcript pp. 568, 569.)

The trial Court's reference to 125 persons related not to something which had just been said by appellant. The most recent mention of this 125 had been made not by appellant, but by the Court, on the preceding day, and more particularly, on page 533 of the transcript. Consequently, this is not an incident (of contempt) at all, but only a statement by the trial Court, and that statement was not an order; *it was the expression of an opinion,* as the words "I think" reveal.

Here there were no statements by appellant against anyone. Nor was there anything inflammatory said.

THIRTEENTH INCIDENT.

The next incident is stated by this Court as follows:

"The certificate quotes a subsequent statement by the Court, 'again responding to an objection urged by Mr. McMillan, and to matters that were incompetent and irrelevant'. It is shown by the record that these matters were specific references to three named individuals who appellant asserted were ex-Communists and would be Government witnesses. Each of the references also included derogatory remarks. The Court then remarked:

'What you propose to do is perfectly plain to me, Mr. Hallinan, and that is to assassinate in advance every witness who might take this stand without any evidence before this court of the general characterizations and vituperations.' The record shows that this remark of the Court was made the basis of a ruling. Appellant replied: 'All right, and that is just what I say, your Honor.' The Court answered: 'That procedure * * * has never been the procedure in the federal courts. I sustain the objection.' "

The record concerning this incident (Transcript pages 473 and 474) is as follows:

"Mr. Hallinan. Then let us get to the next category and root of their false and fraudulent charge, and I hope that these gentlemen are not entitled to the instant protection that Mr. McMillan affords the government agents. They will produce here, they tell us, ex-members of the Communist Party who will testify to certain things. And there are such witnesses. The most fantastic of all that will be produced, to name a few of them, they have Benjamin Kiplau, who occupied most of his life as a labor spy. There was Manning Johnson, a negro, who was raised by the Communist Party from a cafeteria busboy to some sort of organizer and is now qualified as a government witness. There is Louis Budenz who deserted a somewhat impecunious position on a Communist newspaper and returned or went into the Roman Catholic Church and is now——

Mr. McMillan. Just a moment.

Mr. Hallinan. We are entitled to talk about these people, Your Honor.

Mr. McMillan. There was nothing said in our opening statement as to who the witnesses will be.

Mr. Hallinan. I know who they are. They produced some of these people before the Grand Jury. We are entitled to discuss them and warn the jury what is coming, to inform them, to have them look at them with inquisitive eyes. We do not have to keep quiet about every witness that they are going to put on. If we had such a witness that they knew of, they could characterize him, tell about his testimony, why he would be biased or motivated. That goes right to the credibility of the witness. We can test all of that on cross-examination. I think if anything is proper on an opening statement, that is. All they want to do, Judge, is sort of write out an opening statement for the defense and say 'You can say this and no further.'

The Court. What you propose to do is perfectly plain to me, Mr. Hallinan, and that is to assassinate in advance every witness who might take this stand without any evidence before this Court of the general characterizations and vituperations.

Mr. Hallinan. All right, and that is just what I say, Your Honor.

The Court. That procedure may be extant or it may be the procedure in some other courts. It has never been the procedure in the federal courts. I sustain the objection.

Mr. Hallinan. I will have to enter an exception."

It will be observed that the objection "there is nothing said in the opening statement who the

witnesses would be". In other words the objection was to the naming of particular persons and prospective witnesses. (Of the three named, Manning Johnson became a witness at the trial, and Louis Budenz was a witness before the Grand Jury.) The trial Court's ruling was limited to that objection, for what the trial Court said was "I sustain *the* objection".

There was nothing inflammatory in the above statement of appellant and there were no vile epithets hurled. Gitlow had been a labor spy. Manning Johnson was a negro, had been a bus-boy, had become an organizer of the Communist Party and at the time of trial was a government witness. Louis Budenz had left the Communist Party and joined or rejoined the Roman Catholic Church. Is this Court of the opinion that the charge that Budenz had left or deserted the Communist Party and became a member of the Roman Catholic Church is a vile epithet?

FOURTEENTH INCIDENT.

The next and last incident discussed by this Court under the category of attacks upon the prospective witnesses, is stated by this Court as follows:

> "Later in the certificate reference is made to another objection. The record discloses the objectionable statements to have constituted a wholesale attack on 125 persons who appellant asserted would testify for the Government. Appellant accused them of traveling 'any place where they could pick up a few honest dollars of government treasury compensation testifying against Communists here, labor leaders here, school teachers

there, willing to say anything that would bring them a few dollars * * * for fame or what they call fame * * *. They are perjurers of the worst kind * * * spies, turncoats, the very swill of humanity * * *"

The record concerning this incident (Transcript pages 580 to 582) states:

"Mr. Hallinan. The agents of those organizations stirred up anew the conspiracy, revived it, revitalized it, and now, four years after Harry Bridges swore under oath in the Superior Court that he was not and never had been a member of the Communist Party, a perjury charge comes on for trial before you ladies and gentlemen, and we will show by the witnesses for the prosecution that the express and avowed reason for the institution of that was to break the strike in Hawaii, and so said Tom Clark publicly, the Attorney General of the United States, and we will show you that that was the exact and only purpose of fomenting this persecution.

My opening statement has been criticized by admirable judges. The trial procedure may invoke criticism by jurors and even spectators. The sources of inquiry here cover a period of many years. Whether it sounds fantastic or not, there were 125 witnesses. The preparation for the proper trial of such case would consume months. The testimony of all people in previous matters must be read over. I assume, Your Honor, that I should not mention any decision of any court no matter how relevant I consider it to be. I am not going to transgress on your patience.

The Court. We have already discussed those matters at length, Mr. Hallinan.

Mr. Hallinan. These 125 people have testified under oath in numerous matters. The so-called ex-members of the Communist Party have run from New York to Hawaii to San Francisco to Louisiana—any place where they could pick up a few honest dollars of government treasury compensation testifying against Communists here, labor leaders here, school teachers there, willing to say anything that would bring them a few dollars typical of the kind of people that come up in circumstances and periods such as we are going through, now ready for a few dollars, for fame or what they call fame, to keep themselves in the limelight, to swear any man's life away for a hundred dollars. They are perjurers of the worst kind—one of them who will come and hear the very tightest oaths of the Communist Party the very soul of this sort of thing, hired informers, spies, turncoats, the very swill of humanity, these ex-Communists, experts who have now turned upon their old comrades and associations, and finding the pickings more profitable in the safe environment of the government's protectorate, will come in here and swear any man's life away whether they ever saw him before or not."

There was no objection and/or ruling in or to this incident.

The only thing resembling an epithet here is the expression "the very swill of humanity". Standing alone, without the direct statements which precede it, it would be an epithet, but following these direct statements it is not so much of an epithet as it was a summing up in a general term the direct statements

which precede it. Is not the bearing of false witness for hire one of the lowest and dirtiest things a human being can do? Is not perfidy, the betrayal of one's friends for hire a low and dirty thing? At the trial of this case one such witness for the prosecution, on being cornered on cross-examination, openly confessed that on direct examination he had lied concerning the land of his birth, his name, his family, the places where he had lived, the schools which he had attended and his occupation at various times. Another such witness admitted having committed perjury on two separate occasions and each time with respect to a number of different facts and was trapped in the commission of perjury while on the witness stand. Two other such witnesses, including Manning Johnson, testified that Bridges was in New York City taking a bow before a Communist convention and being elected to and inducted in high office in the Communist Party at a time that it was conclusively proven that Bridges was in Stockton, California, addressing a union meeting and attending a night club. Another government witness admitted that he might have committed perjury on a previous occasion. All of these witnesses were admittedly former labor leaders and former members of the Communist Party. One of them admitted that he had received $5,000.00 from the government in a period of ten months for acting as an expert. Others testified to receiving lesser amounts as expert witness fees. Appellant was not exaggerating when, in this fourteenth incident, he described the character of the witnesses whom the prosecution would call.

C. ESPIONAGE AND WIRE-TAPPING BY AGENTS OF THE GOVERNMENT.

The next two paragraphs of this Court's opinion read as follows:

> "Another subject of rulings and statements was the asserted wire-tapping and 'espionage' activities of Government agents against Bridges. Appellant stated that in Seattle in 1937, 'agents of the Immigration Department dictographed his (Bridges') hotel room and tapped his telephone wire.' The Court interrupted and the prosecutor, upon inquiry from the Court, renewed his assurance that no illegally obtained evidence would be introduced. The Court then ruled as follows: 'The objection is sustained, the jury is admonished to disregard the statement of any kind, character or description, bearing upon that matter.'
>
> "Appellant made a subsequent reference to espionage activities of the F.B.I. against Bridges. Objection was again made and again sustained. Almost immediately after the sustaining of the objection appellant referred to 'the boyish workings of the F.B.I.' and stated that the defense would prove that scores of F.B.I. agents had for years been following Bridges, interviewing and threatening his friends and associates, trying to build up a case."

We have no quarrel with what this Court *actually says* in these two paragraphs. Our objection is to the unwarranted and unmistakable implication given by bringing these two paragraphs together in such a way as to indicate that they relate to the same subject

matter, that is, that the ruling mentioned in the first of these two paragraphs foreclosed appellant from making the statements attributed to him in the second of these two paragraphs.

The record pertaining to the matter mentioned in the first of these two paragraphs (Tr. pp. 565-566) is as follows:

> "The Court. * * * There is no question involved in this case of wire-tapping. I take it from assurances given to me on the motion to dismiss, there will be no effort made on the part of the Government to introduce any evidence as a result of any unlawful enterprise?
>
> Mr. Donohue. I renew that assurance.
>
> The Court. You renew that assurance?
>
> Mr. Donohue. Yes, your Honor.
>
> The Court. The objection is sustained, the jury is admonished to disregard the statement, of any kind, character or description, bearing upon that matter."

It should be observed that this ruling related to the matter of wire-tapping and (other) illegal activities on the part of government agents.

The record pertaining to the matter mentioned in the second of these two paragraphs (Tr. pp. 571-573) is as follows:

> "Mr. Hallinan. The motives of the witnesses who will testify, whether they are Communists, ex-Communists, rival union leaders or government agents, are equally open to inquiry by the jury. Bridges was possessed of a faculty that may do him more harm in these matters than all

his serious philosophy. In the year 1941 a convention was held in New York City and the espionage activities of the Federal Bureau of Investigation witnesses reached ridiculous proportions, that is to say, there were four or five men constantly following him. If he went into a hotel lobby, a young man would be looking through a hole cut in newspaper.

Mr. McMillan. I object to that.

The Court. Sustained."

* * * * * * *

"Mr. Hallinan. This is all proper, your Honor, I submit. Can't we show the activities and motives of the witnesses who are agents of the government? Are they exempt?

The Court. I do not know that they are being produced. The matter at this stage of the proceedings is irrelevant and immaterial, and I sustain the objection, Mr. Hallinan.

Mr. McMillan. We do not even know that he is going to bring in that newspaper.

Mr. Hallinan. Ridicule is a very dangerous instrument. People's pride is a sensitive part of their organization. Harry Bridges gave two articles, one to a New York newspaper and the other to a magazine, the New Yorker, which in 1941 described all the boyish workings of the FBI in this case, and excited thereby additional hatred for him in the ranks of an organization that, of course, takes itself seriously.

Mr. McMillan. If Your Honor please, we are obliged to object again. The newspaper articles that he speaks of would be self-serving as legal proposition.

Mr. Hallinan. Your Honor, it all goes to show the knowledge of the espionage and furthermore, the giving of an amusing article——

The Court. Is it your present theory that the FBI were part and parcel of this conspiracy?

Mr. Hallinan. I will say so. We will show that scores of them have for years been following this man interviewing his clients, his friends, berating witnesses, threatening them, doing all sorts of things, trying to build up a case.

The Court. You reserve your comment concerning them until you finish your cross-examination and argue the matter to the jury. At this time it is irrelevant and immaterial."

It should be observed that in the statements of appellant just quoted that not one mention is made of wire-tapping or of other illegal activity on the part of anyone. The statement related to espionage and more particularly those forms of espionage known as surveillance and the questioning of persons.

Observe further that in the second of the two quotations from the record the *objection sustained* was to appellant's remark concerning what the F.B.I. had done; that the next statement of appellant related to two articles by the defendant Bridges ridiculing the F.B.I., [a quite different subject because it related to the probable animus of the F.B.I. toward Bridges because of those articles] and that the third comment of appellant *which this Court mentions in such a way as to imply that it was an act of contempt was made by appellant in* **direct response** *to the trial Court's*

question: "Is it your present theory that the F.B.I. were part and parcel of this conspiracy?"

In other words, in this last instance, *this Court is holding that appellant was guilty of criminal contempt* **for answering a question asked him by the trial Court,** *the answer, itself, being confined to the subject stated in the trial Court's question.*

Is this not "lifting by the bootstraps", i.e., *a straining to find contumacious conduct* **where none in fact exists?**

It should be observed that nothing said by appellant in relation to espionage and wire-tapping by agents of the government was in the nature of a vile epithet or of an epithet at all. And that nothing said by him in that connection was in the least bit inflammatory.

D. THE TWO INCIDENTS MENTIONED AT THE BOTTOM OF PAGE 6 OF THE OPINION.

FIFTEENTH INCIDENT.

This Court continues as follows:

> "Two incidents occurred during arguments addressed to the trial Court which it deemed contumacious. Appellant referred to the fact that he had only three weeks to prepare. The Court asked him if he did not have the assistance of associate counsel. Appellant replied: 'Yes—who made the motions that your Honor treated with contempt.' "

The comment of appellant which this Court quotes appears on page 532 of the transcript. On page 520

of the transcript the trial Court characterized the motions made by previous counsel in language indicating that he thought them contemptible or ridiculous. We have reference to the following statement by the trial Court:

> "The gentlemen preceding you argued entrapment, that the Government entrapped Mr. Bridges into this alleged false swearing—upon what theory entrapment rested I do not know. It was a novel thing for me to hear".

But this is not our main answer to this assignment. The record clearly discloses that the only part of appellant's statement which the trial Court heard was the word "yes" and that the trial Court did not hear appellant say "who made the motions that your Honor treated with contempt". Our authority for this statement appears on page 778 of the transcript. In making the oral assignment of contempt, the trial Court on that page said:

> "At page 532, again counsel, Court—Court, counsel comments. Mr. Hallinan referred to the fact that he had only three weeks to prepare.
>
> The Court. You have the benefit, of course, of an associate counsel—the old firm no doubt are helping a little bit?
>
> Mr. Hallinan. Yes——
>
> (this was in an undertone, a sort of an aside or stage whisper, but the reporter captured it.)
>
> Mr. Hallinan. Yes—who made the motions that Your Honor treated with contempt."

Had appellant's remark been made in a voice volume loud enough for the trial Court to have heard it,

there would have been no occasion for the trial Court to have commented upon the fact that the "reporter captured" such statement. In other words, *it affirmatively appears from what the trial Court, itself, said that such comment by appellant was* **not made in the hearing of the Court** *and therefore did not constitute contempt punishable under Rule 42(a).*

Here there is not even the charge that what appellant said was inflammatory or that it constituted a vile epithet.

SIXTEENTH INCIDENT.

This Court continues:

> "Appellant referred to headlines in newspapers which the trial Court characterized as 'again transcending, bridging, the orders made by the Court with reference to news articles.' In this connection appellant said: 'Did your Honor see the headlines in today's papers, which said that the Government was going to prove not only that Bridges was a member of the Communist Party but had been elected to high office in it?' "

The record concerning this incident (Tr. pp. 567-568) is as follows:

> "Mr. Hallinan. Did your Honor see the headlines in today's papers, which said that the Government was going to prove not only that Harry Bridges was a member of the Communist Party but had been elected to high office in it? What concern was there made for reservation——
>
> Mr. McMillan. Your Honor has instructed the jury not to read the papers.

The Court. Mr. Hallinan, am I entirely obtuse in the trial of this case? Or have we descended into another strata of judicial process? I admonished this jury categorically, unequivocally, and with every bit of vigor that I have,—which vigor is expending itself in colloquy with you—that you are not to read the newspapers (addressing the jury) under any conditions. And this Court, mindful of the admonitions to you, does not indulge himself in the reading of the newspapers. Now, Mr. Hallinan indirectly has given you part of what the headlines are, which in a direct reflection upon this Court's admonition to you.

Mr. Hallinan,——

Mr. Hallinan. Your Honor, all the paper did was repeat what counsel said to the jury yesterday. Now, they said that they would show that in conformity with Communist Party plans of keeping secret the membership of persons prominently identified, that membership cards issued to the defendant were issued in the name of Harry Bridges, that he was some kind of a secret, hidden conspiratorial sort of member; that he was elected under some sort of secret and guilty idea."

From this it affirmatively appears that appellant in making reference to the newspapers had brought to the jury's attention nothing which had not been contained in the opening statement of the prosecution. Certainly this did not constitute criminal contempt or contempt of any character.

It should be observed that nothing inflammatory and that nothing in the nature of an epithet is contained in anything said by appellant in this incident.

III.

THE MATTER OF GOOD FAITH.

This Court next considers the matter of appellant's good faith or lack of it in making his opening statement. This Court commenced this discussion as follows:

> "It is appellant's contention that in his opening statement 'he tried to tell the jury *first* that he expected to show government witnesses to be *liars, perjurers and low characters, who had conspired to give false testimony against Bridges. Second,* that the motives for giving such false testimony were to be found in hatreds engendered by labor disputes in which Bridges had taken part. *Third,* that some of the witnesses had appeared in proceedings to deport Bridges', and that the matters referred to constituted a valid defense. We are unable to view the statements and conduct of appellant *in such a mild and diluted form.* It is true *that counsel might properly inform the jury in a temperate manner that he intended to impeach the veracity and character of opposing witnesses by the introduction of competent impeaching evidence.* Appellant did no such thing, however. *The most abusive language used and the vilest characterizations made were not in the form of a statement of what was expected to be proved but a direct statement by appellant of his opinion of the witnesses.* No other motive can be attributed to such statements and conduct than that appellant deliberately sought to inflame the minds of the jurors and unduly prejudice them in advance of the appearance of any witness in the witness chair. Appellant complains that the opening statement was continually interrupted by

government attorneys. We think properly so. *Objections were interposed by counsel* and rulings made by the Court, *which were disregarded.* Justification for such conduct is attempted to be made upon the ground that the matters stated constituted a valid defense. *Counsel's opinion of the character of witnesses who he thought might be called was not evidence.* He could not validly say that he would prove the statements made because *no witness would be permitted to hurl the epithets* which seemed to flow from the mouth of appellant with such ease and facility." (Emphasis added.)

Observe that this Court concedes that the charge that Government witnesses would be *"liars, perjurers and low characters"* would be "in a *mild* and *diluted* form".

A. CONCERNING VILE EPITHETS, ETC.

This Court will recall that Lewis Carrol had one of his characters in *Alice in Wonderland* say:

"Say a thing three times and it's true."

There is no doubt but that the trial Court repeated over and over again the charge that appellant was using abusive and inflammatory language, was making vile characterizations, was hurling vile epithets, was using vile and vituperative terms and the like. But the mere charging of such things, *no matter how often repeated,* does not make such things so.

Incident by incident, in the order selected by this Court, and in paragraphs printed, except for empha-

sized words, wholly in italics, we have pointed out, in the foregoing pages of this petition, the *absence* of inflammatory matter and the *absence* of vile epithets emanating from appellant. Does this Court have in mind incidents *other than those recited in the opinion?* If so, what are they and why has this Court neglected to mention them?

When it comes to the matter of epithets it seems to us that they are to be found in the charges made by the trial Court against appellant. They are in fact epithets because they assume and charge things against appellant where an examination of the record discloses that such assumptions and charges are without foundation. By making such unfounded assumptions and charges the trial Court has resorted to "name calling". Name calling, particularly where there is no factual basis for the name called, is what we understand an "epithet" to be. Moreover, while there is nothing vile in the words employed by the trial Court in making such assumptions and charges, it seems to appellant that such name-calling is *exceedingly vile* **in its effect** in that it is made the basis and the justification for sending him to jail for a period of six months under the stigma of criminal contempt. Moreover, appellant's characterization of the witnesses whom the prosecution would call were not nearly as inflammatory or nearly as abusive as the charges made by the prosecutor in his opening statement that the three defendants and the witnesses whom they would call (divers persons to the Grand Jury unknown) were members of the Communist

Party and perjurers and had conspired to commit perjury and to defraud the government. The charge of "Communist" today is not only inflammatory, it is in the popular mind of the people of this country a charge of perfidy, a charge of treason, a charge that the person desires to overthrow our government by force and violence, by trickery and deceit, and deliver the people of our nation into the slavery of a cruel, ruthless, unprincipled, godless and god-hating dictatorship. The opening statement of the prosecutor in this case, in effect, asked the jury to look at the three defendants and at all of their witnesses for horns and cloven hoofs and forked tongues.

B. NO WITNESSES WOULD BE PERMITTED TO HURL THE EPITHETS, ETC.

The prosecutor in his opening statement charged the defendants with perjury, with conspiracy and with having defrauded the government. "No witness would be permitted" to testify that the defendants did commit perjury or did commit conspiracy or did defraud the government. That is to say, such witnesses would not be permitted to so testify *using* the *epithets* (i.e. *the words*) perjurer, conspiracy and defraud. In this sense, but only in this sense, is it true "that no witness would be permitted to hurl the epithets" used by appellant. Every charge appellant made against the prospective prosecution witnesses was capable of being proved so **in full substance** and by competent, relevant and material evidence. That

this is so all this Court has to do is to read the decision of the Supreme Court of the United States and the concurring opinion of Mr. Justice Murphy in the case of *Bridges v. Wixon,* for, in effect, every characterization that appellant made of the prospective witnesses was made by members of the Supreme Court of the United States in the case of *Bridges v. Wixon.*

C. APPELLANT'S OPINION.

Let us repeat two statements contained in the above quotation from this Court's opinion.

> "The most abusive language used and the vilest characterizations made *were not in the form of a statement of what was expected to be proved,* but a direct statement by appellant of *his opinion* of the witnesses "and" he could not validly say that he would prove the statements made * * *"

These statements will bear painstaking analysis. They are windows in this Court's mind through which the mental processes of this Court can be viewed. And the mental processes in this instance run counter to the fundamental principles of the law of our land.

The defendant Bridges **knew,** not *thought* but **knew,** whether he was or ever had been a member of the Communist Party. If he was not and had not been a member of the Communist Party, he *knew,* not as a matter of opinion but as a matter of **absolute knowledge,** that no person *could* testify that he was or had been a member of the Communist Party *without com-*

mitting wilful and deliberate perjury. Under such circumstances, he *knew* also, and *knew positively,* that if two or more persons testified to the *same* incidents or acts of participation as showing that he was a member of the Communist Party those two or more persons were not only committing *perjury, but that they had* **conspired** *to commit perjury.* In addition, the defendant Bridges *knew* who the witnesses were who had testified against him in the two previous deportation proceedings. He *knew* what their testimony had been. He *knew* their histories and their background. He *knew* what Landis and Sears and Biddle and the justices of the U. S. Supreme Court had said about their character and credibility, and he **knew** to a **normal certainty** that only witnesses of the type, kind, background and character of those who had theretofore testified against him **could** be produced by the prosecution on the present trial.

At the trial the *law* **presumed** Bridges to be *innocent.* Appellant was the attorney of and spokesman for the defendant Bridges. *Appellant was in Court in no other capacity.* Because of this relationship of attorney and client, *Bridges' knowledge* became **appellant's knowledge,** not as a matter of fact but a matter of *positive law,* in so far as such knowledge was disclosed to appellant by Bridges. Indeed, even where such a defendant *lies* to his attorney by claiming innocence where he is in fact guilty, the law vests in the attorney, indeed, **imposes upon him,** *for the purposes of the trial,* a **knowledge** *that his client is* **innocent.**

As Bridges had pleaded "not guilty" it **must** be presumed that he had told appellant that he was not guilty and it **must** be presumed that appellant believed that Bridges was not guilty.

For the foregoing reasons the characterizations which appellant made of the prospective prosecution witnesses were not matters of *his own personal opinion* of those witnesses, but were matters of his **knowledge** concerning them: matters of his *knowledge* not only by legal presumption but also *by legal compulsion.*

The statement by this Court to the effect that such characterizations were only a statement of appellant's *opinion* is tantamount to a holding that the defendant Bridges had no knowledge of being innocent of the charges against him and had conveyed no such knowledge of innocence to appellant. It is tantamount to a holding that the defendant Bridges *was guilty* of the charges against him and that appellant had no basis, *other than personal opinion,* for a *belief* that Bridges was innocent.

In this connection we think it important to direct this Court's attention to a statement made by the trial Court in its preface to its oral finding that appellant was guilty of criminal contempt, wherein the trial Court, by unmistakable implication, *accused both Bridges and appellant* **of being Communists,** or, in other words, evidenced a pre-judgment *of Bridges' guilt and of appellant's* **knowledge** *thereof.*

Commencing near the bottom of page 774 of the transcript the trial Court said:

"I say to you, Mr. Hallinan, long after the case of United States v. Harry Bridges has become judicial history, long after this Court has gone to whatever happy reward judges may have, these courts will remain as beacons in our judicial system, wherein, we hope, expect and pray that the rights of men may be adjudicated without regard for station in life or race, color or creed.

"However, there is an anomaly apparent throughout the country today and *exemplified,* perhaps *in some of our more recent trials,* in that *those who cry so earnestly for protection under the mantle and cloak of our Constitution* of the United States *would at the same time destroy and seek to destroy every vestige of decency and judicial goodness and sanctity inherent in the federal judicial system.* If I permitted this matter to go on unheeded, it would, in my opinion, represent a tragic commentary on our system, orderly as it is, in the administration of justice."

The only possible pertinency of the trial Court's remark about "those who cry so earnestly for protection under the mantle and cloak of our Constitution" was to *accuse appellant* of being in that class and of being in the class of those who "would at the same time destroy and seek to destroy every vestige of decency and judicial goodness and sanctity inherent in the federal judicial system". The reference to recent trials was obviously a reference to the recent trial of a number of high-ranking Communists in New York *(U. S. v. Dennis)* wherein similar charges were made. Thus these statements by the trial Court *accused* appellant, *in effect,* and by unmistak-

able implication, *of being a Communist lawyer of a Communist client.*

It seems to us that this Court's statement to the effect that appellant's characterizations were but his opinions is indicative of the same state of mind, the same pre-judgment, the same ignoring of the presumption of innocence, the same refusal to realize that, for the purpose of trial, the *knowledge* of the defendant Bridges was, *as a matter of law,* the *knowledge,* and **not** merely the *personal opinion,* of appellant.

It is true that this matter of knowledge of appellant was *also* a matter of opinion. But insofar as it was a matter of opinion it was predicated on certain things, all of which were matters of official record in the trial Court and are of official record in this Court: they are all contained in the file of the case of *Bridges v. Wixon,* 144 Fed. (2d) 927.

What were such matters?

1. The Landis opinion in the first Bridges deportation proceeding which was bodily incorporated in the record in the second Bridges deportation proceeding.

2. The Sears opinion in the second Bridges deportation proceeding.

3. The Board of Review's opinion in the second Bridges deportation proceeding.

4. Attorney General Biddle's opinion in the second Bridges deportation proceeding.

5. The majority opinion of the U. S. Supreme Court in the case of *Bridges v. Wixon.*

6. The concurring opinion of the late Mr. Justice Murphy in the case of *Bridges v. Wixon,* and

7. Even the dissenting opinion of certain justices in the case of *Bridges v. Wixon.*

Is an opinion derived from a reading and study of such judicial and quasi-judicial documents, accepting as true the findings in such documents, an opinion which springs from the mind of the individual advocate who so reads and studies such documents? Can it be said to be an opinion *and nothing more? Can it be said to be an opinion the holding and expression of which* **is evidence of bad faith?** It seems to us, and we believe that it will seem to other members of the bench and bar, that affirmative answers to these questions are implicit and inherent in the opinion filed by this Court.

Let us turn now to this Court's statement that appellant's characterizations "were not in the form of a statement which was expected to be proved".

Does the record support this assertion? It does not.

Before appellant's opening statement had gone one transcript page appellant said to the jury (Tr. 490):

> "Now, as has been said to you too, the statements of counsel in an opening statement are not evidence and cannot be accepted by you as evidence, yet it must follow, it must be taken for granted, that in making an opening statement an attorney *puts his credit at the risk of what he says in this statement. He would certainly expect to excite the animosity of the jury by saying something that he did not sincerely believe and that he did*

not sincerely expect to prove. Therefore, in what I say in the opening statement, you may take this, and I have bound myself to this obligation, that anything that we tell you we will prove conclusively by evidence introduced from witnesses upon the stand—not by any arguments, suggestions, or anything of that kind, but by clear and unequivocal evidence.

"But one might say, well, how can you assume to prognosticate so accurately what you are going to be able to do? And I will say this, that we can tell you *because it is an old story.* As has been indicated to you before,—and in suggesting this I am not going to mention the results of these matters or comment on the propriety or impropriety of them—but this is the fifth inquiry into this subject."

On page 528 of the transcript appellant said to the Court in the absence of the jury:

"Now, if I should say to this jury that I will prove a conspiracy of this kind and at the end of it they say, 'He has lied to us and he has deceived us,' *is that going to help my client?* I say I will prove the conspiracy to put perjured testimony on the stand, to say that Mr. Bridges was a Communist."

And on page 552 of the transcript appellant said to the trial Court in the presence of the jury:

"I suppose if I deceive this jury, or I say something that I can not prove to the extent that I have promised to prove it, *then my credit with the jury and the credit of the entire defense lapses. And I am willing that that should be so. Now, I can't see how I could be more sincere than that.*"

There is much more in the statement of this Court concerning the good faith of appellant to which we could and would take exception did time permit. It will suffice for us to say that both in the foregoing and in the remaining portions of this Court's opinion concerning good faith this Court in effect overrules the United States Supreme Court's decision in the case of *Bridges v. Wixon* with respect to what is relevant and material by way of defense where the charges are as they are in this case and in effect overrules the decision of the Supreme Court of the United States in the case of *Alford v. U. S.*, 282 U.S. 687, with respect to the degree of protection which a trial Court should give to prosecution witnesses. In the latter case the United States Supreme Court on page 692 in reversing this very Court said "But no obligation is imposed on the Court, such as suggested below, to protect a witness from being discredited on cross-examination short of an attempted invasion of his constitutional protection from self-incrimination properly invoked."

IV.

THE CROSS-EXAMINATION OF GARNER.

This Court commences its discussion of this subject as follows:

> "We now consider the charge of contempt as it relates to the cross-examination of witness Garner. It is charged in the certificate that 'Mr. Hallinan had launched into a dissertation upon the deportation proceedings.' The trial court in mak-

ing this statement apparently referred to a question put by appellant in the cross-examination of the witness Garner, who had identified himself as an attorney for the Bureau of Immigration and Naturalization. The question was: 'Is it your custom as an attorney for the Government to keep abreast of the current decisions of the Supreme and Circuit Court of Appeals relating to immigration matters?' In response to an objection made by the Government the Court stated that no issue with respect to the prior deportation proceedings against Bridges was before the court and that what the witness had done 'with respect to matters of prior consequence' would not help determine any issue in the case before the court."

The record pertaining to the matter recited in the above statement of this Court appears on pages 705 and 706 of the transcript and is as follows:

"Q. Is it your custom as an attorney for the government to keep abreast of the current decisions of the Supreme and Circuit Court of Appeals relating to immigration matters?

Mr. Donohue. I object to the question, if Your Honor please; his custom in prior matters is not in issue. The question is what he did in this instance.

Mr. Hallinan. That would help bring out what he did here, what resulted when the ordinary course of events has been followed.

The Court. I remark and I reiterate, Mr. Hallinan, as I did with your colleague, Mr. MacInnis, that there is no *issue* with respect to the deportation proceedings before this Court, there is no *issue* upon which the Supreme Court decision

would be controlling as a matter of fact or as a matter of law. Now, what this man may have done with respect to matters of prior consequence would not aid or determine any issue in this case.

Mr. Hallinan. Of course, Your Honor, we will still have to go ahead and offer such evidence, attempt to adduce such matters on cross-examination, as we may feel advised. And while, of course, we are bound by the rulings of the Court, we can not afford to fall into the folly of refraining from asking questions which we deem proper, and having a ruling upon them, so as to preserve a correct record. Now, I understand that an objection was made to the last ruling, but I have heard no ruling on it.

The Court. The objection is sustained."

This Court makes no reference to the above statement by appellant. Appellant made that statement to avoid even the *appearance or suggestion* of contumacious conduct. By that statement appellant *implicitly invited* the trial Court to make a ruling forbidding appellant from asking questions of the character which he announced he was going to ask and by such a ruling affirmatively establish of record a foreclosure which could not be held of an appeal by the defendant Bridges to be too uncertain to support the claim that the ruling had in fact and in law amounted to a foreclosure. Indeed, appellant by the words "* * * of course, we are bound by the rulings of the court, * * *" *told the trial Court that should it make such a ruling of foreclosure appellant would accept it as sufficient for the preservation of the record.*

The trial Court did not accept appellant's implicit invitation to make such a ruling. The ruling made was limited to sustaining the objection to the question already asked and did not extend to future questions. By not making a ruling, such as appellant invited, the trial Court acquiesced, or, at least, *seemed to acquiesce,* in the course which appellant announced he was about to follow. Indeed, although the record does not show it, as appellant completed the statement "we cannot afford to fall into the folly of refraining from asking questions which we deem proper, *and having a ruling upon them, so as to preserve a correct record.",* the trial Court nodded his head. The reason why the record does not show this is because appellant at that time had no idea that he, himself, was then on trial or had any need to make a record for *his own,* as distinguished from the defendant Bridges, *protection.*

This Court continues its statement as follows:

> "It appears that almost immediately after this ruling was made appellant asked two other questions concerning the witness's acquaintance with the decisions in the prior deportation proceedings. There followed a prolonged argument by counsel on both sides, most of which was outside the presence of the jury. The certificate qnotes the reiteration, during this argument, of the Court's ruling that 'these matters of prior consequence [have] no legal bearing upon this matter.' Appellant's response to this ruling was: 'I will simply have to take the position, your Honor, that I consider very much in error your position, and I will have to continue to ask the questions and build a

record and ask such questions as I may deem advised, and I say that you have no right to make your mind up as to whether a conspiracy of these witnesses exists or does not exist; that that is something direct to the jury.' "

The prolonged argument to which this Court refers commenced on page 706 and terminated on page 734 of the transcript—a matter of some twenty-eight transcript pages. The incident to which this Court last refers was as follows (Transcript pages 732 to 734):

"The Court. Now, we will just take that primitive notion as to that phase of the matter. You make the bland assertion that this witness on the stand, Mr. Garner, has in some manner, at some place unidentified,——

Mr. Hallinan. 'To the grand jury unknown.'

The Court. ——joined a conspiracy. When he joined the conspiracy, of course, is problematical, speculative and wholly in the limbo of uncertainty. He has joined in it some time. This unwholesome conspiracy that started in 1934?, is that the date? Or thereabouts. And that this chain of co-conspirators that is gained and augmented in force and number, until now it reached the proportions of 125 people, all of them, all of them are out of step with Harry Bridges.

Now, to ask this Court to relax the vigilance which is traditional under the rules of evidence as I learned them, and as I think we both learned them together, would be *in my opinion* to broaden the scope to a point of unheralded dominion, and to a point wherein there would result prejudice to the prosecution as well as to the defendants at bar. *I think*——

Mr. Hallinan. I will simply have to take the position, Your Honor, that I consider very much in error your position. And I will have to continue to ask the questions and build a record and ask such questions as I may deem advised, and I say that you have no right to make your mind up as to whether a conspiracy of these witnesses exists or does not exist; that that is something direct to the jury.

The Court. You ask me to relax the rules of evidence upon that basis, and I say to you that I am not going to relax the elemental rules of evidence that apply on cross-examination of this witness.

Mr. Hallinan. Why, I have read off the rules, Your Honor, and it is not a question of asking you to relax them, it is a question of whether you will restrict them and whether you will put a new circle around the rules of evidence and say that certain questions that are proper to be asked may not be asked. That is the point. It isn't a question of asking you to relax them, it is a question of protesting against an improper stricture of the rules of evidence.

The Court. Mr. Hallinan, you have my ruling. You may call the jurors."

This Court quotes appellant's statement about continuing to ask questions as though it were an act of defiance of the trial Court. It was nothing of the kind. It was a *renewal* of appellant's previous *implicit invitation* to the trial Court to make a ruling *explicitly* forbidding appellant to ask questions along the line indicated by him: questions which appellant said he would *have to ask to build a record.*

Again the trial Court failed to make such a ruling.

It is true that in those incidents appellant's statements were argumentative in form. But not one bit more argumentative in form than were the statements of the trial Court. This Court has accurately described the twenty-eight pages of the record as being "a prolonged argument", but it was not only "by counsel on both sides", as this Court says, but one in which the trial Court participated *with equal argumentativeness, as the above excerpt from the record plainly reveals.* Moreover, the argumentative portion of such argument took place in the absence of the jury.

This Court continues its discussion as follows:

> "The record discloses that the very first question asked the witness Garner by appellant after the jury was reseated was: 'If you did not read all the decision of the Supreme Court, at least you read most of it, is that right?' Objection was made and sustained. The question immediately following was: 'Now, did you read that portion of the decision of the Supreme Court of the United States which charged the federal agents with illegal wire-tapping of Harry Bridges?' Objection was made and sustained."

We have no complaint with what the Court says in this paragraph, but we have a serious complaint concerning what this Court leaves out between the end of this paragraph and the beginning of the next one.

The two questions, objections and ruling mentioned in this paragraph occur on pages 734 and 735 of the transcript and were followed immediately, on pages 735 and 736, by this:

> "Mr. Hallinan. Q. Have you any independent knowledge—now, aside from any designation of

any court—have you any independent knowledge of your own or information from any person in the government's employ that at any time during the course of this proceeding or of the previous—We will withdraw that—the course of this proceeding, any wire-tapping was done on Harry Bridges' telephone?

Mr. Donohue. I object, if Your Honor please, and now suggest to Your Honor that it would appear from the fact that Mr. Hallinan has intentionally asked three questions, all in my judgment contrary to the ruling of this Court, that he is doing exactly what he said he would do, and that is, despite Your Honor's ruling, he would continue to ask these questions for the purpose of preserving some kind of record. I ask that he be admonished at this time not to continue this line of questioning.

Mr. Hallinan. May I be heard in that, Your Honor? As I understand it,——

The Court. Just a moment, Mr. Hallinan. The objection is sustained, the jury is admonished to disregard it.

Mr. Hallinan. Your Honor, this does not relate to any hearing, this means presently and now. I want to know if this gentleman indulged in any illegal activity in connection with procuring a verdict in this case.

The Court. You had it in a two-way thrust before.

Mr. Hallinan. I withdrew that. I said I withdrew that.

The Court. You may answer the question."

Here we find Mr. Donohue, the chief prosecutor, *explicitly requesting* the trial Court to make a ruling of

the character which appellant had twice before *implicitly* invited. The trial Court ignored Mr. Donohue's *explicit* request just as it had twice before ignored appellant's *implicit* invitation. Why? There is only one possible answer. Because the trial Court wanted **not** to make any such broad ruling of exclusion. That this is so is made manifest by the fact that *in this very instance* the trial Court, after his sustaining the objection to the question, reversed itself and **permitted the witness to answer.**

What does this signify? It signified that **none** of the previous rulings of the trial Court *had been intended by the trial Court* to foreclose appellant from asking any and all questions along "this line", to use the expression of Mr. Donohue. And it signified that the *trial Court did not intend its ruling* **in this instance** to have any such broad prohibitory effect.

What did this mean to appellant? It meant that *only* by continuing to ask questions along *"this line"* could he make the record show *just how broad* the Court's ruling of exclusion was.

Appellant was concerned with having the record show *not only error* in the limitation placed upon the cross-examination of the witness Garner with respect to his credibility, but such *drastic error* that an Appellate Court could not say, on an appeal by Bridges, *that the error was not prejudicial.* He had a right to do this. Indeed, he had a duty to the defendant Bridges to do this. Not only a moral duty but a *legal duty:—a duty imposed upon him as an officer of the Court.* He could do this only by continuing to ask

"this line" of questions until he felt certain, based upon his knowledge of *how frequently* Appellate Courts are of the opinion that what appears to the trial lawyer to be *prejudicial* is only *harmless* error, that the error in this instance was *so grave* and was *so apparent* that it *could not be dismissed as harmless* by the Appellate Court.

It is because appellant tried to discharge this obligation that he now finds himself adjudged guilty of criminal contempt.

To return to this Court's opinion this Court continues as follows:

> "Later came a question with respect to the witness's knowledge of wire-tapping prior and up to the time that Bridges was admitted to citizenship. Objection to this question was made and sustained. Another question concerned the witness's knowledge of wire-tapping at the time of the two previous deportation proceedings. Objection was made and sustained and the jury admonished to disregard any implications in the question. The witness was asked by appellant whether he had had any knowledge of wire-tapping before the deportation proceedings, whether he had protested against illegal wire-tapping, whether he had stated to any government official that he would not be a party to an illegal effort to injure Bridges. Objections to all these questions were sustained."

Let us look at the last of the incidents mentioned in this portion of the opinion. The record (pages 739 and 740 of the transcript) reads as follows:

Mr. Hallinan. Q. Did you at any time in the course of your connection with this case state to any official or agent of the government that you would not be a party to an illegal effort to injure this man?

Mr. Donohue. I object to the question, if Your Honor please, and I again ask Your Honor to admonish counsel to confine his cross-examination to that well established rule of law to which Your Honor invited his attention just a few moments ago.

The Court. The objection is sustained."

Here we find Mr. Donohue *again* asking the trial Court to admonish appellant not to ask questions along the same "line" and we find the trial Court *again* failing to comply with the prosecutor's request.

This Court continues:

"The witness was then asked whether he had read in one of the prior deportation proceedings that 62 government witnesses had been rejected by the trier of fact as liars and perjurers. The objection to this question was also sustained. It was followed by an almost identical question with reference to a different prior deportation proceeding."

Let us look at the second of these two incidents (Tr. pp. 741-742):

"Q. Now, getting away from these two proceedings that seem to involve me in so much criticism, you do know this, that 60 witnesses, different from those that testified before Landis, testified before Sears and that Sears rejected all but one of them as liars and perjurers; isn't that right, Mr. Witness?

Mr. Donohue. I again object——

Mr. Hallinan. Might I be heard on this, Your Honor?

Mr. Donohue. ——and I again ask Your Honor to instruct counsel that he confine his questions to the limitations set by Your Honor just a few minutes ago, and suggest to Your Honor that his failure to do so is only a deliberate and purposeful plan on his part to call to the attention of the jury matters which as a matter of law Your Honor has said may not be properly called to their attention."

There then followed a long statement by appellant at the end of which on page 744 the trial Court said:

"The objection is sustained."

Thus **three times** did the prosecutor **explicitly** request the trial Court to make a ruling which would foreclose appellant from asking questions along the same "line" and thus **in each of these three instances** did the trial Court *refuse* the request *by failing to take notice of it.*

This Court then makes mention of three other questions, objections and rulings sustaining the objections. They were questions along the same line but directed to different phases or different incidents. They need not be particularly discussed.

There is one more excerpt which we desire to quote from the record, however. As the witness Garner was about to leave the stand (Tr. pp. 753 to 755) the following occurred:

"Mr. Hallinan. As I understand it, your Honor, there are questions, as I said, I wanted

to ask this witness out of those two opinions and I suggested, since I didn't want to make it appear even that I was transgressing upon the court's ruling, that this witness would be further cross-examined in the absence of the jury. Isn't that the rule that you made? Isn't that what you said would be done? Otherwise what I want to do is ask specific questions now out of those two documents and ask him whether those are parts of the things that he said he read in them. I do not want to seem to be showing bad faith. I could probably ask them before the jury and allow objections to be sustained, but I do not want to entrench even on the spirit of the court's ruling.

Mr. Paisley. Your Honor, it has always been my understanding that once counsel understands the court's ruling as to allowing testimony, he cannot stand up before the court and repeatedly ask the same questions over again.

The Court. I know of no such rule that would permit Mr. Hallinan to adopt that course of procedure or practice.

Mr. Hallinan. Might I suggest this, your Honor: If not then, I would have to ask them in the presence of the jury, and then that is going to excite some argument. I want to ask the witness now—I want to read off portions of the decision of the Supreme Court and Judge Landis' decision and ask him if those were parts that he read before he asked these two defendants whether or not they were members of the Communist Party. I want to ask him the specific things because he says he does not believe he read them all, that he read excerpts from them. I want to find out what those excerpts were and whether those excerpts would bear upon the probability as that he then

asked these other questions. I have to, to be consistent, ask those questions. If you wish, I will go ahead and ask them in the presence of the jury, unless you will tell me now, if you wish, that I will not be permitted to ask any such questions, and then I will just make an offer of proof and let it go at that.

The Court. Counsel, thus far you have not had much regard for my rulings, whether I made them formally or informally, in the presence of the jury or in the absence of the jury. It is a sort of travesty at this late stage again to tell me about it. Do you have an objection to it, counsel?

Mr. Paisley. I certainly do, your Honor.

The Court. The objection is sustained.

Mr. Hallinan. There isn't any question, your Honor, to which an objection could be made.

The Court. I thought there was."

Here we find appellant explicitly suggesting to the trial Court that it make an explicit ruling and we find the trial Court avoiding to make such an explicit ruling even at this late stage by accusing appellant of not having shown "much regard" for the rulings of the trial Court "whether I made them formally or informally".

The latter statement by the trial Court expresses the defect in the heart of the charge of contempt made against appellant. The trial Court's complaint was that appellant had not shown "much regard" for the informal rulings of the trial Court. That is those expressions of opinion which do not amount to rulings as far as the case of the defendant Bridges was concerned. The trial Court was try-

ing to control the course of the trial not by making rulings which the defendant Bridges could make use of on appeal but by placing a personal pressure on appellant in his status as an officer of the Court as distinguished from his status as the attorney for the defendant Bridges.

This Court continues its discussion of this subject as follows:

> "Appellant extensively argues the general propriety of bringing in the defenses disclosed by the above related questioning. *The vice found here is not in bringing in the defenses* but the manner in which it was attempted to be accomplished. All practitioners know that in the trial of cases courts and lawyers often disagree as to the admissibility of evidence. It is further generally recognized that the trial Court has the duty of determining the question of admissibility for the time being at least and that when the Court has spoken, upon counsel is then imposed the duty of abiding by that ruling. The error, if any, is to be corrected elsewhere. But, argues appellant, before the alleged error can be considered elsewhere, the record *must* be *sufficiently explicit* to enable a reviewing court to understand the nature and purpose of the excluded evidence. *With this statement we are in entire agreement* but are unable to find in the record before us justification for the conduct of appellant on that ground. We think appellant went far beyond the necessity of making a record and that his conduct shows a deliberate and studied design to ignore the rulings of the Court in order to get before the jury the excluded matter. A sufficient record was made

long before appellant desisted." (Emphasis added.)

In view of the fact that the trial Court **on six separate occasions** (the first at the beginning of appellant's cross-examination of the witness Garner, and the last at the end of that cross-examination), *patently avoided* the making of an *explicit* ruling, what basis is there for this Court's holding to the effect that the trial Court *did make* **an explicit ruling?** We submit that there is not only *no* basis for such holding, but that the record *affirmatively establishes* that there is *no basis* for such holding. We submit, also, that in view of the fact that the trial Court six times avoided the making of such a ruling and in one instance permitted the witness to answer a question along the same "line", reveals that there is *no basis* for this Court's conclusion viz.:

> "We think appellant went far beyond the necessity of making a record and that his conduct shows a deliberate and studied design to ignore the rulings of the Court in order to get before the jury the excluded matter. A sufficient record was made long before appellant desisted".

Moreover, if "a sufficient record was made long before appellant desisted" *at what point was such a record made?* More particularly, in view of the six avoidances by the trial Court to make an *explicit* ruling, *at what point could appellant have* **safely** *assumed that the* **non-explicit** *rulings up to that point made by the trial Court* **would be regarded by this Court as being the equivalent of an EXPLICIT ruling?**

We have one other criticism to make concerning this Court's statement in relation to appellant's cross-examination of Garner. This Court says:

> "We realize the inadequacy of the cold record to fully present the situation as it existed in the courtroom during the turbulent times portrayed by this record".

It seems to us that by these words this Court admits that it has gone *beyond* the *"cold record"* to **imagine** "the situation as it existed in the courtroom" *in order to find justification for affirming the judgment* and, in such *imagining,* has *assumed* **in appellant's disfavor** *the* **existence** *of things* **not** *presented in the record.* In other words, we see in these words of this Court an *admission* that the conviction of appellant is being affirmed *in part* upon the basis of things *not charged in the trial Court's certificate* **and the existence of which appellant has had no opportunity to refute.**

V.

THE OPINION CONTRAVENES THE RIGHT OF COUNSEL CLAUSE OF THE SIXTH AMENDMENT.

The Sixth Amendment to the Constitution of the United States provides:

> "In a criminal case the accused shall enjoy the right * * * to have the assistance of counsel for his defense".

This provision guarantees to a defendant in a criminal case the right of counsel not only in name but in substance. It guarantees to him the right to the aid

of counsel who in presenting his defense is not bound by any rulings of the trial Court other than those which are so explicit as to constitute error on an appeal by him from a judgment of conviction should such rulings be erroneous. He is guaranteed the right of a counsel who is unfettered in the presentation of his defense by *expressions of opinion* by the trial Court which do not amount to rulings and unfettered by *positions* taken by the prosecutor which have not been converted by the trial Court into rulings.

This provision of the Sixth Amendment not only confers such a right upon a defendant in a criminal case but, by necessary implication (i.e., necessary to make the provision itself effective), it confers a corresponding right upon an attorney who is serving as counsel for a defendant in a criminal case. This is to say, an attorney while serving as counsel for a defendant in a criminal case is guaranteed by this constitutional provision the right to serve as such without being subjected to restraints which are not also and equally imposed upon the defendant, himself. **He has the right to perform the functions of an advocate.**

The opinion of this Court **reveals on its face** that appellant is being punished for disregarding **"opinions expressed"** by the trial Court and for disregarding a **"position taken"** by the prosecutor.

The opinion further shows on its face that appellant is being punished for having expressed opinions when, according to this Court's opinions, should not have been expressed) where the subject matter of such opinions was subject matter within the *knowledge* of the defendant Bridges and, therefore, within

the *knowledge* of appellant, for the purposes of the trial, not as a matter of fact *but as a matter of law, as a matter of legal compulsion.*

We have hereinbefore mentioned the status of defense counsel in totalitarian countries. *If this opinion is allowed to stand* it will set a precedent for divesting defendants in criminal cases of the right of counsel. It will set a precedent for a trial judge in a Federal Court to say to a defense counsel:

> "I am *not going to limit you* in your presentation of the defense. I am not going to make any *ruling,* and, more particularly, I am not going to make any *explicit ruling,* to serve as a predicate for a claim of error on appeal by the defendant should he be convicted. But I am going to *express the opinion* to you as an individual that you should not raise any question concerning the character or credibility of any prosecution witness, and you should not do or say anything which runs counter to any position taken by the prosecutor with respect to how the case for the defense should be presented, and you should not give voice to anything which is within the knowledge of the defendant which is not, as a matter of fact, within your own personal knowledge, which in any way reflects upon any witness called or to be called by the prosecution, and I am going to warn you that if you do not comply with this *expression of opinion* as fully as you would if it were an explicit order binding upon the defendant, I am going to find *you* guilty of criminal contempt and I am going to sentence *you* to jail for a period of six months and I am going to order *your* name stricken from the roll of attorneys permitted to practice in this Court".

We raise this point, and especially set up and claim it, in this petition in order to preserve our right to raise this point in an application to the Supreme Court of the United States for a writ of certiorari should this petition for a rehearing be denied.

VI.

THE OPINION CONTRAVENES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

The only hearing accorded to appellant as a matter of right by the law is a hearing on appeal in this Court.

The opinion of this Court, *if it is allowed to become the decision of this Court,* will have the effect of depriving appellant of his liberty without due process of law in violation of the Fifth Amendment to the Constitution of the United States. It will do so by granting to appellant a hearing *in form only* **and by denying him a hearing in substance and on the merits.**

It will do so by accepting the charges made by the trial Court as true where the record not only does not sustain such charges **but affirmatively establishes that such charges are false.**

We contend that this transcends mere error, that it transcends an error in judgment or in the exercise of discretion, that it constitutes a positive violation of appellant's constitutional right to be accorded due process of law before being deprived of his liberty.

We raise this point and especially set up and claim it in order to preserve our right to raise this point in an application in the Supreme Court of the United States for a writ of certiorari should this petition for a rehearing be denied.

VII.

THIS COURT SHOULD GRANT A REHEARING IN THIS CASE BECAUSE THIS COURT IN THE PRESENT OPINION HAS FAILED TO PASS ON OR MENTION THE APPEAL OF APPELLANT FROM THE ORDER OF THE TRIAL COURT STRIKING THE NAME OF APPELLANT FROM THE ROLL OF ATTORNEYS PERMITTED TO PRACTICE AS ATTORNEYS IN THE TRIAL COURT.

VIII.

THIS COURT SHOULD GRANT A REHEARING IN THIS CASE BECAUSE IT HAS FAILED IN THE PRESENT OPINION TO PASS UPON THE ISSUE RAISED BY APPELLANT THAT THE TRIAL COURT, BY REASON OF LAPSE OF TIME HAD LOST JURISDICTION TO CERTIFY APPELLANT IN CRIMINAL CONTEMPT UNDER RULE 42(a) FOR MATTERS OCCURRING DURING THE OPENING STATEMENT.

IX.

THIS COURT SHOULD ACCORD A REHEARING BECAUSE THE OPINION OF THIS COURT IS IN CONFLICT WITH THREE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES, VIZ.:

(1) With the decision of the Supreme Court of the United States in the case of *Bridges v. Wixon,* 326 U.S. 135, with respect to what is